No. 97-954-CFX Title: Janice E. Hetzel, Petitioner
v.
Prince William County, Virginia, and Charlie T. Deane

Docketed:
December 10, 1997 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Dec 9 1997	Petition for writ of certiorari filed. (Response due January 9, 1998)
	Jan 9 1998	Brief of respondents County of Prince William and Charlie Deane in opposition filed.
	Jan 21 1998	DISTRIBUTED. February 20, 1998
	Feb 23 1998	REDISTRIBUTED. February 27, 1998
	Mar 2 1998	REDISTRIBUTED. March 6, 1998
	Mar 16 1998	REDISTRIBUTED. March 20, 1998
	Mar 23 1998	Petition GRANTED. Judgment REVERSED. Opinion per curiam.

****

No.

In The

Supreme Court of the United States

October Term, 1997

JANICE E. HETZEL,

Petitioner,

vs.

COUNTY OF PRINCE WILLIAM and CHARLIE T. DEANE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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47 pp.

QUESTION PRESENTED FOR REVIEW

May an appellate court, by writ of mandamus, set aside an order granting a new trial, and force a successful civil rights plaintiff to accept a remittitur, without offering the plaintiff the option of a new trial as to damages, without offending the Seventh Amendment to the Constitution of the United States?

LIST OF PARTIES TO THE PROCEEDING

The petitioner, Janice E. Hetzel, was the plaintiff below and appellee in the Court of Appeals. Respondents County of Prince William (Virginia) and Charlie T. Deane were defendants below and appellants in the Court of Appeals. G.W. Jones and C.E. O'Shields were defendants in the trial court, but were not parties to the appeal and are not respondents in this Court.

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CITATION OF THE REPORTS OF OPINIONS IN THE CASE

This petition seeks review of an order of the United States Court of Appeals granting a petition for mandamus. That order is not reported, and is provided in the Appendix. The trial court's order granting a new trial is also unreported, and is provided in the Appendix.

The petition for mandamus arose out of the district court's grant of a new trial following an earlier remand from the Court of Appeals. That decision of the Court of Appeals is reported as *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 584, 136 L. Ed. 2d 514 (1996).

STATEMENT OF THE BASIS FOR JURISDICTION

The Order of the Court of Appeals granting respondents' petition for a writ of mandamus was entered September 12, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 2101(e) to review the judgment in question by writ of certiorari before judgment. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980) (reviewing, on petition for writ of certiorari, writ of mandamus issued by Court of Appeals to district court respecting grant of new trial).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth verbatim in the Appendix.

The statutes and provisions involved are the First Amendment to the Constitution of the United States, U.S. Const., Amdt. 1; the Seventh Amendment to the Constitution of the

United States, U.S. Const., Amdt. 7; the Fourteenth Amendment to the Constitution of the United States, U.S. Const., Amdt. 14; the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a); and 42 U.S.C § 1983.

STATEMENT OF THE CASE

A. The Underlying Litigation

This was a civil action alleging unlawful discrimination and retaliation in the course of defendants' employment of Petitioner Janice E. Hetzel. Petitioner was, and remains, the only female Hispanic police officer in the Prince William County Police Department.

Officer Hetzel brought harassment, discrimination, and retaliation claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as under 42 U.S.C. § 1983 alleging violations of the Free Speech Clause of the First Amendment (made applicable to the defendants by operation of the Fourteenth Amendment) and violations of the Equal Protection Clause of the Fourteenth Amendment.

Officer Hetzel's claims were tried in January of 1995 before the Hon. Leonie M. Brinkema. The jury heard evidence for more than a week. During trial defendants moved for, but were not granted, relief under Fed. R. Civ. P. 50(a). After the close of evidence and argument of counsel, the jury deliberated over the course of three days before reaching a mixed verdict: the jury found in favor of defendants on Officer Hetzel's claims of discrimination and harassment, but found in favor of Officer Hetzel on each of her three claims of unlawful retaliation.

The jury awarded compensatory damages of $250,000 on each of three counts: unlawful retaliation in violation of Title VII; unlawful retaliation in violation of Officer Hetzel's free speech rights under the First Amendment, and unlawful retaliation in violation of Officer Hetzel's equal protection rights under the Fourteenth Amendment, for a total of $750,000 in compensatory damages.

Defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and alternatively for a new trial pursuant to Fed. R. Civ. P. 59(e). The district court held, as a matter of law, that in the absence of underlying discrimination no claim may be asserted for unlawful retaliation solely under the Equal Protection Clause and Section 1983 (thereby reducing the jury award to $500,000), but otherwise denied defendants' motions.

B. The First Appeal

Defendants appealed, and Officer Hetzel cross-appealed. The United States Court of Appeals for the Fourth Circuit decided the appeal on July 11, 1996. The Court of Appeals upheld the determination of liability in favor of Officer Hetzel, but vacated the damage award as excessive, remanding the case for a recalculation of damages and attorney's fees. *Hetzel v. Prince William County*, 89 F.3d 169 (4th Cir.), *cert. denied*, 117 S. Ct. 584, 136 L. Ed. 2d 514 (1996). Judge Luttig's opinion affirmed "the jury's finding of liability on [Officer Hetzel's] retaliation claims." However, characterizing Officer Hetzel's testimony as to her damages as "self-serving" and lacking "corroborat[ion]," the Court of Appeals decided that the jury's verdict was "outrageous" and vacated the compensatory damages award. The Court of Appeals suggested that the appropriate compensatory damage award on remand would be approximately $9,000 to $11,000.

This Court denied Officer Hetzel's petition for a writ of certiorari.

C. Proceedings Giving Rise to This Writ

On remand, Officer Hetzel moved the district court to conduct a trial as to damages. After a non-evidentiary hearing, the district court entered an Order on December 20, 1996, awarding damages in the amount of $50,000, but permitting Officer Hetzel to reject the remittitur and move for a new trial. The district court "ORDERED that plaintiff notify the Court by close of business on Friday, January 10, 1997 whether she will accept this award or move for a new trial."

Officer Hetzel then filed a timely motion under Fed. R. Civ. P. 59(e), requesting that the Court award a new trial as to damages only. (Notwithstanding the pending motion under Rule 59, which divested the December 20 Order of finality or appealability, defendants filed a notice of appeal from that Order.)

By Order dated June 24, 1997, the district court granted Officer Hetzel's Rule 59 motion for a new trial as to damages only. Defendants filed another "amended" notice of appeal from the June 24 Order granting a new trial, as well as a petition for a writ of mandamus or prohibition. In the district court, a new trial as to damages was set for September 16, 1997.

Defendants moved the Court of Appeals for expedited consideration of their appeals, and alternatively for a writ of mandamus or prohibition, barring the new damages trial. On Officer Hetzel's motion the Court of Appeals dismissed the two appeals as interlocutory (a decision not pertinent to this petition), but granted the defendants' petition for a writ of mandamus on September 12, 1997.

In so doing, the Court of Appeals stayed the damages trial, and ordered the district court to "recalculate plaintiff Hetzel's

award of damages for emotional distress and to enter final judgment thereon." The Court of Appeals instructed the district court, "pursuant to our earlier mandate, to 'closely examine the awards' " in two other cases " 'which we believe are comparable to what would be an appropriate award in this case.' "

Because the Court of Appeals' use of the writ of mandamus to impose a specific remittitur, without permitting Officer Hetzel the option of a new trial as to damages, violates the Seventh Amendment, Officer Hetzel petitions this Court to review the action of the Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

In the Fourth Circuit, the right to a jury trial in civil rights cases is seriously in jeopardy.[1] In this case the Court of Appeals, in violation of the Seventh Amendment, has imposed by writ of mandamus its own view of the magnitude of injury suffered by the Petitioner, and has denied her the Constitutional right to choose a new trial as to damages.

---

1. *See also* the petitions for certiorari in *Grier v. Titan Corp.* and *Gill v. System Planning Corp.*, filed concurrently with the instant petition, in which the Fourth Circuit also rejected the properly-instructed juries' assessment of damages and liability in employment related civil rights cases.

I.

AN APPELLATE COURT, BY WRIT OF MANDAMUS OR OTHERWISE, MAY NOT IMPOSE A REMITTITUR ON A SUCCESSFUL CIVIL RIGHTS PLAINTIFF WITHOUT PERMITTING THE PLAINTIFF THE OPPORTUNITY TO ELECT A NEW TRIAL AS TO DAMAGES.

A. The Court Of Appeals' Writ Of Mandamus Imposes A Remittitur On Petitioner Without The Option Of A New Trial As To Damages, In Violation Of The Seventh Amendment To The Constitution.

A remittitur may not be imposed on a successful plaintiff without offering the plaintiff the option of a new trial as to damages. In this case, the district court offered that option to Petitioner; Petitioner selected that option; and the Court of Appeals — using the unusual and inappropriate method of mandamus — denied that right to a trial.

The Seventh Amendment to the United States Constitution guarantees the election offered by the district court to Officer Hetzel:

> [N]o court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.

Kennon v. Gilmer, 131 U.S. 22, 29, 33 L. Ed. 110, 9 S. Ct. 696 (1889). In *Kennon*, this Court held that the action of an appellate court:

> without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented.

131 U.S. at 270-28, 33 L. Ed. at 113, 9 S. Ct. at 698.

In short, in accord with the Seventh Amendment, a "remittitur gives the plaintiff a choice. 'He can refuse to accept the reduced amount of damages and instead proceed to trial.' " *Korotki v. Goughan*, 597 F. Supp. 1365, 1383 (D. Md. 1984) (quoting Wright & Miller, *Federal Practice and Procedure*). "Remittitur is allowed only when the verdict cannot be justified upon the evidence and only if the court affords the plaintiff the option of a new trial." *Boyd v. Bulala*, 672 F. Supp. 915, 921 (W.D. Va. 1987). *See, e.g., Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d 586 (4th Cir. 1996) (noting option of new trial or remittitur); *Atlantic Coast Line R.R. Co. v. Bennett*, 251 F.2d 934, 939 (4th Cir. 1958) (same); *Fuller v. Brown*, 15 F.2d 672, 678 (4th Cir. 1926) (same); *Freeman v. Case Corp.*, 924 F. Supp. 1456 (W.D. Va. 1996) (same); *Seabury Management Co. v. PGA of America, Inc.*, 878 F. Supp. 771, 784 n.24 (D. Md. 1994) (noting "the Court would be required to offer the plaintiff the option of a new trial on damages"); *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 809 F. Supp. 400, 413 (D.S.C. 1992), *aff'd without opinion*, 989 F.2d 492 (4th Cir. 1993) (noting option of new trial or remittitur); *Lavay Corp. v. Dominion Federal Savings & Loan Assn.*, 645 F. Supp. 612, 618 (E.D. Va. 1986) (same); *Casdale v. Dooner Labs, Inc.*, 343 F. Supp. 917, 918-20 (D. Md. 1972) (surveying cases). *See also Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 625-27 (4th Cir. 1977) (discussing availability of direct appeal from remittitur in the absence of a new trial).

B. The Grant Of A New Trial Is A Matter Peculiarly Within The Discretion Of The District Court, And It Is An Abuse Of The Writ Of Mandamus To Reverse The Grant Of A New Trial.

Quite apart from the unconstitutionality of the action of the Court of Appeals, the use of the extraordinary writ of mandamus to bar a new trial is an abuse of the writ. A writ of mandamus is an extraordinary remedy, to be used sparingly. The grant of a new trial, a matter inherently committed to the discretion of the district court, is particularly inappropriate for review by way of extraordinary writ. In *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193 (1980) (per curiam), this Court noted:

> A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires." The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable" [as it must be for mandamus to issue].
>
> To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review.

449 U.S. at 35, 101 S. Ct. at 190-91 (citations omitted). While

review of a trial court's decision not to overturn a jury verdict is not inconsistent with the Re-Examination Clause of the Seventh Amendment, *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996), such review must be carefully cabined and deferential in nature. "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context' . . . while appellate judges see only the 'cold paper record.' " *Gasperini, supra*, 116 S. Ct. at 2225 (citations omitted).

What has occurred here is nothing less than the use of an extraordinary writ to circumvent the rule against interlocutory appeal. *See, e.g., Thorn v. Parkland Chevrolet Co.*, 416 F.2d 95 (4th Cir. 1969) (per curiam) ("final judgment rule cannot be avoided by this expedient" of extraordinary writ) (denying writ where new trial granted); *Clayton v. Warlick*, 232 F.2d 699 (4th Cir. 1956) ("What applicants are seeking is to review by application for mandamus an interlocutory order from which Congress has not seen fit to grant a right of appeal. This may not be done."); *Southern Railway Co. v. Madden*, 224 F.2d 320 (4th Cir. 1955) (per curiam) ("we do not think that the statute which allows appeal only from final orders, except in a limited class of cases, can be evaded by the simple device of asking this court to issue one of its extraordinary writs") (denying writ where new trial ordered as to damages alone).

Taking from Officer Hetzel her right to elect a new trial as to damages was unconstitutional, and doing so by writ of mandamus was an abuse of the writ.

CONCLUSION

Petitioner Janice E. Hetzel prays that this Court grant this Petition and issue a writ of certiorari to review the Order of the United States Court of Appeals for the Fourth Circuit granting a writ of mandamus in this matter.

Dated: December 8, 1997

Respectfully submitted,

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APPENDIX A — ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED JUNE 24, 1997

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 94-919-A

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, plaintiff's Motion for a New Trial is GRANTED, and it is hereby

ORDERED that the judgment of $500,000 entered on April 5, 1996, be and is vacated as to damages but not liability, and it is further

ORDERED that this civil action be returned to the active docket by the Clerk for a retrial of the damages only. Because the grant of a new trial is an interlocutory order, the defendants' notice of appeal is MOOT, and it is further

Appendix A

ORDERED that the parties contact the Court on Tuesday, July 1, 1997 at 10:30 a.m. by telephone to arrange for a trial date.

The scope of the new trial will be limited solely to damages for emotional distress and the evidence is limited to that which existed as of the date the original jury trial was held. In the telephone conference the parties may raise discovery or procedural concerns.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 24th day of June, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 94-919-A

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Defendants.

MEMORANDUM OPINION

This matter comes before the Court on plaintiff's Motion for a New Trial. Because this Motion raises essentially the same issues as plaintiff's Motion to Set Trial Date and for Ancillary Relief, the Court finds that further oral argument is not necessary and will resolve the Motion on the briefs.

I.

This action was filed in 1994, and came on for trial by jury on January 23, 1995. On February 2, 1995, the jury returned its verdict in favor of the plaintiff, an Hispanic Prince William County police officer, on her claims of (i) unlawful retaliation in violation of the Free Speech Clause of the First Amendment, made applicable to the defendants by the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983; (ii) unlawful

retaliation in violation of the Equal Protection Clause of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983; and (iii) unlawful retaliation in violation of Title VII, 42 U.S.C. § 2000e, *et seq*. The jury awarded compensatory damages of $750,000 for emotional distress, which were apportioned $250,000 to each count. The defendants against whom the judgment was awarded are the County of Prince William and its police chief, Charlie T. Dean.

On April 5, 1995, the Court denied defendants' Motion for a New Trial and granted in part defendants' Motion for Judgment as a Matter of Law to the extent that the Court determined that plaintiff's Equal Protection claim was not valid as a matter of law. Accordingly, the Court reduced the plaintiff's recovery to $500,000. The Court also denied plaintiff's request for injunctive relief requiring defendants to promote her to the rank of sergeant and awarding appropriate front and back pay. Attorneys' fees and costs totaling $176,293 were awarded.

Defendants appealed the judgment and award of attorneys' fees and plaintiff cross-appealed the denial of injunctive relief. On July 11, 1996, the Court of Appeals for the Fourth Circuit affirmed the jury's findings on liability and this Court's ruling on injunctive relief, but held that the compensatory damages award of $500,000 was "grossly excessive when compared to the limited evidence of harm presented at trial and would result in a serious miscarriage of justice if upheld." *Hetzel v. County of Prince William*, 89 F.3d 169, 173 (4th Cir. 1996). The Court remanded the case to this court for recalculation of the award of damages, as well as the award of attorneys' fees in light of the recalculated damages. In all other respects the rulings in the trial were upheld.

On December 16, 1996, before this Court had recalculated the damages and attorneys' fees, plaintiff filed a Motion to Set Trial Date and for Ancillary Relief in which she argued that the appellate court by reducing her judgment had offered her a remittitur which she rejected and therefore had a right to a new trial. The Court entered an Order on December 20, 1996, which denied plaintiff's Motion as premature and then recalculated the award of compensatory damages to $50,000.[1] The Court also strongly encouraged the parties to try to settle the case.[2] Settlement was unsuccessful.

On January 7, 1997, plaintiff filed the present Motion for a New Trial in which she declined the recalculated compensatory damages and requested a new trial on the issue of damages. Defendants oppose the Motion.

II.

Plaintiff bases her claim for a new trial on the Seventh Amendment's guaranty of a right to trial by jury. The Seventh Amendment provides that ". . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

1. In its opinion, the Fourth Circuit directed this court to "closely examine the awards in *Bradley v. Carydale Enter.*, 730 F. Supp. 709, 726-27 (E.D. Va. 1989) and *McClam v. City of Norfolk Police Dep't.*, 877 F. Supp. 277, 284 (E.D. Va. 1995), which we believe are comparable to what would be an appropriate award in this case." 89 F.3d at 173. Although these two bench trials awarded compensatory damages of $9,000 and $15,000, respectively, this Court concluded based on its observation of all the evidence presented during the eight day trial that a somewhat higher award was justified.

2. The Court postponed recalculating attorneys' fees to await the results of the parties' efforts to settle the judgment.

re-examined in any Court of the United States, than according to the rules of the common law."

The parties do not dispute that the Fourth Circuit's opinion, as implemented by this Court when it reduced the jury's verdict to $50,000, became a remittitur, which is defined in Black's Law Dictionary as "[t]he procedural process by which an excessive verdict of the jury is reduced." Nor do the parties dispute that the plaintiff has rejected the reduced damage award and asked for a new trial. What remains at issue is whether, in light of the Fourth Circuit's remand and instructions, this Court has the authority to order a new trial. A careful review of the parties' briefs, authorities and the Fourth Circuit's opinion leads this Court to conclude that plaintiff must be afforded a new trial on the issue of damages.

III.

Defendants argue that under the mandate of the Fourth Circuit a new trial is not available to plaintiff. "This Court's authority over this case now is constrained by the Fourth Circuit decision both as to the law of the case and the parameters of its current review. The Fourth Circuit mandate must be implemented, and this Court cannot engage in further proceedings which would conflict with that mandate." (Defendants' Opposition to Plaintiff's Motion to Set Trial Date at 5). The mandate at issue simply and clearly reverses the judgment and remands the case "for recalculation of damages for emotional distress and recalculation of attorneys fees." This Court has done what the mandate directed; it has recalculated the damages. However, plaintiff's rejection of that recalculation creates a significant new issue, that is, whether plaintiff may retry her damages claim. This Seventh Amendment issue was

not before the Fourth Circuit and therefore could not have been contemplated in its decision or addressed in the mandate.

As the plaintiff demonstrates, the case law in the Fourth Circuit clearly holds that when a court finds a jury's verdict excessive and reduces it, the prevailing party has a right either to accept the reduced award or have a new trial, either on the entire case or just as to damages. *Atlas Food Systems and Serv. v. Crane Nat. Vendors*, 99 F.3d 587, 593 (4th Cir. 1996) ("if a court finds that a jury award is excessive, it is the court's duty to require a remittitur or order a new trial"); *Korothi v. Goughan*, 597 F.Supp. 1365, 1383 (D.Md. 1984) ("remittitur gives the plaintiff a choice. 'He can refuse to accept the reduced amount of damages and instead proceed to trial.' "); *Boyd v. Bulala*, 672 F.Supp. 915, 921 (W.D. Va. 1987), *rev'd. on other grounds*, 877 F.2d 1191 (4th Cir. 1989) ("Remittitur is allowed only when the verdict cannot be justified upon the evidence, and only if the court affords the plaintiff the option of a new trial").

In looking at the appealability of an order of remittitur, the Fourth Circuit has recognized that where a plaintiff rejects a remittitur, the district court should order a new trial. *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir. 1977), *cert. denied*, 434 U.S. 923 (1977). The appellate court has observed that "if the proper course for the district court in this case was to treat plaintiffs as having rejected the remittitur, then a new trial should have been ordered, and none of the issues in this case would properly be before us for review, for such orders are interlocutory in nature and leave no final judgment from which to appeal." *Id.* at 626.

Whether the jury verdict is reduced by the trial or appellate level court makes no difference to the Seventh Amendment right

of trial by jury. As the Federal Circuit expressed in *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1030 (Fed. Cir. 1996), *cert. denied* 117 S.Ct. 951 (1997) (citing *Unisplay v. American Electronic Sign Co.*, 69 F.3d 512, 519 (Fed. Cir. 1995)),

> [a] court is not at liberty to supplant its own judgment on the damages amount for the jury's findings. Therefore, in holding that a jury damage award is excessive, an appellate court has two options. It may simply reverse the jury award and order a new trial or allow the plaintiff the option of agreeing to a remittitur in a specified amount.

Thus, this Court concludes that plaintiff has a right to a new trial, which will be limited to the issue of compensatory damages for emotional distress existing at the time the first trial was held. The issue of attorneys' fees and costs cannot be adequately addressed now, given that any award of fees must be evaluated in light of the plaintiff's success at trial. Therefore, the Court defers ruling on any of the fee petitions until the conclusion of the new trial. *Farrar v. Hobby*, 506 U.S. 103 (1992).

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 24th day of June, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED DECEMBER 20, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 94-919-A

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Defendants.

ORDER

For the reasons stated in open court, plaintiff's Motion to Set Trial Date and for Ancillary Relief is DENIED. The Court has recalculated the award of compensatory damages as directed by the Fourth Circuit and awards the plaintiff fifty thousand dollars ($50,000.00), and it is hereby

ORDERED that plaintiff notify the Court by close of business on Friday, January 10, 1997 whether she will accept this award or move for a new trial.

The issue of attorney's fees will be briefed by the parties

before the Court recalculates the award of attorneys fees, and it is further

ORDERED that plaintiff submit her brief by the close of business on Friday January 10, 1997, and defendants submit their brief by the close of business on Friday, January 24, 1997.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 20th day of December, 1996.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN NOS. 95-1934, -2004, -2010 REVERSING AND REMANDING TO THE DISTRICT COURT DECIDED JULY 11, 1996

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-1935

JANICE E. HETZEL,

Plaintiff-Appellee,

v.

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE,

Defendants-Appellants,

and

G. W. JONES; C. E. O'SHIELDS,

Defendants.

No. 95-2004

JANICE E. HETZEL,

Plaintiff-Appellant,

v.

Appendix C

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE,

Defendants-Appellees,

and

G. W. JONES; C. E. O'SHIELDS,

Defendants.

No. 95-2010

JANICE E. HETZEL,

Plaintiff-Appellant,

v.

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE,

Defendants-Appellees,

and

G. W. JONES; C. E. O'SHIELDS,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-94-919-A)

Appendix C

Argued: June 5, 1996

Decided: July 11, 1996

Before ERVIN, HAMILTON, and LUTTIG, Circuit Judges.

Reversed and remanded by published opinion. Judge Luttig wrote the opinion, in which Judge Ervin and Judge Hamilton joined.

COUNSEL

ARGUED: Sharon Elizabeth Pandak, County Attorney, Prince William, Virginia, for Appellants. John Michael Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellee. **ON BRIEF:** Angela M. Lemmon, Assistant County Attorney, Megan E. Kelly, Assistant County Attorney, Prince William, Virginia; Bernard J. DiMuro, DIMURO, GINSBERG & LIEBERMAN, P.C., Alexandria, Virginia, for Appellants. Elaine C. Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellee.

OPINION

LUTTIG, Circuit Judge:

Appellee, Janice E. Hetzel, an hispanic female who currently is a police officer in good standing in Prince William County, Virginia, brought the instant action against appellants, Prince William County and Police Chief Charlie T. Deane, as well as against other police officers not parties to this appeal, under Title VII and section 1983 alleging harassment and discrimination on the basis of sex and national origin. Hetzel

also claimed that because of her attempts to enforce her right to be free of discrimination, the defendants took various retaliatory actions, including failing to promote her to the rank of sergeant, in violation of the First Amendment, the Equal Protection Clause and Title VII. She requested some $9.3 million in damages plus backpay, retroactive promotion to sergeant, and other injunctive relief.

After an 8-day trial, the jury rejected all of Hetzel's counts (seven in all) alleging sex and national origin discrimination and that she was denied a promotion because of such discrimination, finding that the defendants had not engaged in any invidious discrimination in violation of Title VII. The jury concluded, however, that Chief Deane retaliated against Hetzel "because of [her] engaging in protected speech," and awarded $750,000 in damages for Hetzel's emotional distress. Following the verdict, the district court granted appellants' motion as a matter of law on one of Hetzel's three retaliation claims, and thus reduced the damage award to $500,000. The court also awarded appellee in excess of $180,000 in attorney's fees and costs, but, because the court was concerned that "there is a likelihood that [Hetzel] would interpret any act of discipline as retaliation," it refused to grant Hetzel any injunctive relief against future retaliation. J.A. at 291. For similar reasons, the district court denied Hetzel's request for retroactive promotion to sergeant, noting that "[a]lthough the jury may have found that the failure to promote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant." *Id.* at 290; *see also id.* at 291 & n.5.

Both parties appealed raising numerous issues. We leave intact the jury's finding of liability on appellee's retaliation claims. Because we conclude that both the damage award and the award of attorney's fees are excessive as a matter of law, however, we reverse the judgment of the district court and remand the case for further proceedings.

I.

Appellants first contend that the award of $500,000 for emotional distress, based almost entirely on Hetzel's own self-serving testimony concerning stress and headaches, is unsupported by the evidence and excessive as a matter of law. Hetzel, acknowledging that the evidence of damages comes largely from her own testimony, responds that the award is supported by the uncontroverted evidence, is similar to other awards for mental distress in comparable cases, and is easily justified by the numerous adverse actions taken by appellants. Although Hetzel claims that denial of transfers, disparate disciplinary treatment, poor performance evaluations, abusive treatment, a 1995 Internal Affairs ("I.A.") investigation, and the failure to promote are all adverse employment actions supporting the damage award, only the alleged failure to promote and the 1995 I.A. investigation can even possibly constitute adverse retaliatory action, as the other acts either were taken outside the statute of limitations or did not deprive Hetzel of a valuable government benefit, *see, e.g.*, *Huang* v. *Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990).

A jury's award of compensatory damages will be set aside on the grounds of excessiveness only if " ' "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice," ' " *Johnson* v.

Hugo's Skateway, 974 F.2d 1408, 1414 (4th Cir. 1992) (*en banc*) (quoting *Johnson* v. *Parrish*, 827 F.2d 988, 991 (4th Cir. 1987) (quoting *Aetna Cas. & Sur. Co.* v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941))), or "no substantial evidence is presented to support it," *Barber* v. *Whirlpool Corp.*, 34 F.3d 1268, 1279 (4th Cir. 1994). The district court, with little analysis, rejected appellants' claim that the $500,000 damage award for emotional distress was excessive, concluding that the award was fully supported by the evidence because "most importantly" Hetzel "was crying and shaking throughout most of the trial." J.A. at 284. Quite obviously, a litigant's demeanor while at counsel's table is not evidence to support a damage award.

The evidence presented at trial concerning Hetzel's emotional distress consisted almost exclusively of Hetzel's own brief, conclusory statements — comprising less than ten pages of a joint appendix exceeding 5,000 pages — that she had headaches, stress, trouble reading to her daughter, and problems with her family life as a result of appellants' actions. Hetzel presented no evidence corroborating the existence of any of her supposed specific harms. She remains an officer in good standing with the police department. She continues to perform her duties with no noticeable diminution in performance, as her most recent performance evaluation, which was nothing short of stellar, confirms. She has no observable injuries or physical ailments. Indeed, although Hetzel insists that she was devastated and humiliated by appellants' actions, she has never once seen a doctor, therapist, or other professional, or even sought the counsel of a friend, to help her deal with what is supposedly an enormous problem overshadowing all aspects of her life.

Hetzel's thin evidence of rather limited damages would in-and-of itself entitle her to only a minimal damage award for

intangible injuries. *See, e.g.*, *Rodgers* v. *Fisher Body Div.*, 739 F.2d 1102, 1108 (6th Cir. 1984) (holding that plaintiff's own brief testimony that he was forced to go on welfare and had his car repossessed causing humiliation and distress was insufficient to support a sizeable award for emotional distress), *cert. denied*, 470 U.S. 1054 (1985); *cf. Carey* v. *Piphus*, 435 U.S. 247, 264 (1978) ("[A]lthough mental and emotional distress . . . is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."). However, only a part of Hetzel's harms are properly attributed to appellants' retaliatory actions. *Much, if not all, of Hetzel's claimed distress was actually caused by her erroneous belief that she was the victim of invidious discrimination*, and of course, given the jury's findings for the defendants on all of Hetzel's claims of discrimination, Hetzel is entitled to no damages for any injuries which were caused by her belief that she was the victim of invidious discrimination. Sergeant Collier, the one witness Hetzel points to as corroborating her contention that the appellants' retaliatory actions caused her intangible injuries, testified that Hetzel had told him that she was under continuous emotional stress and feeling a "sense of frustration" because of her "dealing with this issue of *discrimination*." J.A. at 1352 (testimony of Sgt. Collier) (emphasis added). Moreover, as the district court recognized, but failed to take into account in its brief examination of the magnitude of the damages, some of Hetzel's stress and emotional difficulties must be attributed to her tendency to overreact to situations. *See id.* at 291 n.5.[1]

---

1. As the district court noted:

> [A discussion] conducted by Sergeant Metheny on February 24, 1995 provides a clear example of the risk of plaintiff's (Cont'd)

The only other evidence of emotional distress that even arguably supports an award of damages is Hetzel's reaction following a fifteen-to-twenty minute Internal Affairs interview, conducted on January 15, 1995, concerning whether Hetzel had improperly advised a suspect of his *Miranda* rights — an investigation which led to an oral reprimand for Hetzel's improper actions. While we have significant doubts as to whether this interview constitutes an adverse employment action which is actionable under Title VII or section 1983, we do not here need to conclusively decide that issue because any temporary reaction Hetzel may have had to this interview does not entitle her to any substantial or significant damage award. Although other officers testified that Hetzel was briefly distraught following the interview, Hetzel, after composing herself, finished out the remainder of her shift. Plainly a $500,000 award for a reaction following a brief interview during the course of a successful investigation is a gross miscarriage of justice.

Simply put, the jury was presented with insufficient evidence "to place a high dollar value on plaintiff's emotional

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(Cont'd)

> overreaction. The [discussion] was designed to explore plaintiff's understanding of the Miranda warning and to eliminate any confusion plaintiff may have had about the requirements for a proper waiver. . . . Despite Sergeant Metheny's assurance that she would not be disciplined for [a] 1993 case, and before he could question her about it, plaintiff responded that "[i]f you're going to get into this, I refuse to answer any questions right now and I'm going to walk out of here because this is complete harassment." Even First Sergeant Collier, plaintiff's supervisor and strongest supporting witness, felt that plaintiff overreacted to the [discussion].

Id. (internal citations omitted).

harm." *Rodgers*, 739 F.2d at 1108. That this award is outrageous is confirmed by even a cursory analysis of the impressive array of cases cited by the appellee in support of the jury verdict. These cases, all of which contained a substantial award of $25,000 or more for intangible injuries such as emotional distress, involved plaintiffs that either were the victims of invidious discrimination, suffered serious — often permanent — physical injuries, or were discharged and had difficulty finding alternative employment. *See* Appellee's Br. at 32-34 & n.29. For example, in *Meyers* v. *City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994), the Sixth Circuit rejected the contention that an award of $25,000 for mental anguish, humiliation and loss of reputation to an assistant fire chief unconstitutionally forced to retire was excessive and not supported by the evidence because the fire chief, *who had been discharged*, had lost ten pounds, suffered from insomnia, and was under a doctor's care for stomach problems. In another case bearing some similarity to the instant case, *Wulf* v. *City of Wichita*, 883 F.2d 842, 874-75 (10th Cir. 1989), the court held that a $250,000 award for emotional distress to a police officer *following unlawful termination*, which was supported only by the testimony of the plaintiff that he was stressed, angry, depressed and frustrated, and similar testimony from his wife, was grossly excessive and remanded the case for recalculation of damages not to exceed $50,000. In stark contrast to these cases, and the others relied upon by the appellee — most of which did not involve an award of damages for emotional distress even approaching the magnitude of the award in this case — Hetzel suffered no discrimination, was not physically injured, is not under the care of a physician, and remains an officer in good standing on the Prince William County police force. *See also Spence* v. *Board of Educ.*, 806 F.2d 1198, 1200-01 (3d Cir. 1986) (affirming district court's remittitur of jury award of $22,060 for emotional

distress where plaintiff testified that she was "depressed and humiliated" by a retaliatory transfer).

As this court has often remarked, "an award of substantial compensatory damages . . . must be proportional to the actual injury incurred. . . . The award must focus on the real injury sustained. . . ." *Piver* v. *Pender County Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988). Here, the award of $500,000 was grossly excessive when compared to the limited evidence of harm presented at trial and would result in a serious "miscarriage of justice" if upheld. Accordingly, we set aside the damage award and remand the case to the district court for recalculation of the award of damages for emotional distress.[2] Upon remand, the district should closely examine the awards in *Bradley* v. *Carydale Enter.*, 730 F. Supp. 709, 726-27 (E.D. Va. 1989), and *McClam* v. *City of Norfolk Police Dep't*, 877 F. Supp. 277, 284 (E.D. Va. 1995), which we believe are comparable to what would be an appropriate award in this case.

II.

Appellants also contend that the district court erred in granting appellee's entire $176,293 request for attorney's fees. The district court, after concluding that the unsuccessful discrimination and harassment claims against all defendants — two of which are not even a party to this appeal because they fully prevailed — "shared a common core of operative facts" with the successful retaliation claims against the city and Chief

2. Because we conclude that the $500,000 award is outrageous, we do not need to address Hetzel's contention that the district court improperly reduced the award by $250,000 in granting a judgment as a matter of law for the defendants on one of her retaliation claims.

Deane, and that Hetzel had achieved significant relief in the form of a "substantial damage[ ]" award, granted appellee's full petition for attorney's fees. J.A. at 288-89. We will reverse a district court's determination of attorney's fees only "if under all the facts and circumstances [the award] is clearly wrong." *Hugo's Skateway*, 974 F.2d at 1418 (internal quotation marks omitted).

Especially in light of our determination that the evidence does not support a substantial damage award, we believe the award of $176,293 in attorney's fees was "clearly wrong." Given the limited results she obtained in this case, Hetzel is not entitled to an award of significant, much less full, attorney's fees. As the Supreme Court has instructed, " '[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' " *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992) (quoting *Riverside* v. *Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in the judgment)). Whereas Hetzel's complaint requested $9.3 million in damages, back pay, retroactive promotion to sergeant, and other injunctive relief, she will ultimately receive only a pittance of her original damages request and no injunction [sic] relief, promotion nor back pay. Moreover, the Supreme Court has also explained that,

> [w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. . . . We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. *A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.*

Hensley v. *Eckerhart*, 461 U.S. 424, 435, 439-40 (1983) (emphasis added); *see also Farrar*, 506 U.S. at 114 ("Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " (quoting *Hensley*, 461 U.S. at 436)). Here, Hetzel failed on her core claims — the seven counts alleging invidious sex and national origin discrimination. Because Hetzel has gained but an insignificant portion of the relief she originally requested and because she has failed to prevail on her most consequential claims, she is entitled only to a fraction of her attorney's fees.

In sum, we vacate the fee award and remand to the district court for reconsideration of appellee's fee petition.

III.

Finally, we consider appellee's cross-appeal. Hetzel claims that because she prevailed on her retaliation claim she is "presumptively" entitled to equitable relief in the form of front and backpay, or retroactive promotion to sergeant, and that the district court abused its discretion in refusing to award any such relief. We disagree. With respect to backpay, the evidence clearly showed that Hetzel earned more as a police officer than she would have earned as a sergeant because officers, but not sergeants, are paid overtime. With respect to a promotion or front pay, the district court determined:

> Although the jury may have found that the failure to promote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant.

J.A. at 290. We can find nothing in the voluminous record in this case that even suggests that the district court abused its discretion, and we will not order that someone be promoted to a higher level within a paramilitary organization where they lack the requisite qualities to perform the duties of the job effectively.[3]

For the reasons stated herein, we reverse the judgment of the district court and remand the case for recalculation of damages for emotional distress and recalculation of attorney's fees.

REVERSED AND REMANDED

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3. Both parties raise numerous other issues. We have carefully considered each issue and have concluded that the remaining claims either have not been properly preserved for appeal or are without merit.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT GRANTING MOTION FOR WRIT OF MANDAMUS STAYING DISTRICT COURT PROCEEDINGS FILED SEPTEMBER 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1878
(CA-94-919-A)

In Re: BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA; CHARLIE T. DEANE, Prince William County Police Chief,

Petitioners.

ORDER

The Board of Supervisors of Prince William County moves this Court for an interlocutory appeal of the district court's order of June 24, 1997, granting plaintiff Hetzel's motion for a new trial on the issue of damages. Alternatively, the Board petitions this Court pursuant to 28 U.S.C. § 1651 for a writ of mandamus.

The Court denies the motion for an interlocutory appeal. The petition for mandamus, however, is granted. The scheduled retrial on the issue of damages in the case of *Hetzel v. County of Prince William* is, hereby, stayed pending further order of the Court.

Pursuant to our judgment and opinion in *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), the district court is ordered to recalculate plaintiff Hetzel's award of damages

for emotional distress and to enter final judgment thereon. In recalculating damages, the district court is, pursuant to our earlier mandate, to "closely examine the awards in *Bradley v. Carydale Enter.*, 730 F. Supp. 709, 726-27 (E.D. Va. 1989), and *McClam v. City of Norfolk Police Dep't*, 877 F. Supp. 277, 284 (E.D. Va. 1995), which we believe are comparable to what would be an appropriate award in this case." *Hetzel v. County of Prince William*, 89 F.3d 169, 173 (4th Cir. 1996).

Judges Hamilton and Luttig concur in the order of mandamus. Judge Ervin dissents from such order. Judges Hamilton, Luttig, and Ervin concur in the order denying the County of Prince William's motion for an interlocutory appeal.

For the Court

/s/ Patricia S. Connor
Clerk

APPENDIX E — CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

(Ratified July 9, 1868)

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding

Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave;

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* Changed by section I of the twenty-sixth amendment.

but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

§ 704 [§ 20003-3]. Other unlawful employment practices

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Appendix E

STATUTORY PROVISIONS

42 USC § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory *or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

No. 97-954

In The

Supreme Court of the United States

October Term, 1997

JANICE E. HETZEL,

Petitioner,

vs.

COUNTY OF PRINCE WILLIAM and CHARLIE T. DEANE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SHARON E. PANDAK*
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QUESTION PRESENTED FOR REVIEW

When a Court of Appeals mandate becomes final and operative, after an appeal to this Court, does that Court of Appeals have the right to enforce its mandate by issuing a writ of mandamus to a trial court which has disobeyed it?

LIST OF PARTIES TO THIS PROCEEDING

The petitioner, Janice E. Hetzel, was the plaintiff below and appellee in the Court of Appeals, Respondents County of Prince William (Virginia) and Charlie T. Deane were defendants below and appellants in the Court of Appeals. G.W. Jones and C.E. O'Shields were defendants in the trial court, but were not parties to the appeal and are not respondents in this Court.

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Appendix E — Per Curiam Opinion Of The United States Court Of Appeals For The Fourth Circuit In *Gill v. System Planning Corporation*, 121 F.3d 698 (4th Cir. 1997) Decided August 25, 1997 ..... 34a

Respondents ask the Court to deny this Petition for a Writ of Certiorari, which at bottom does no more than raise an issue which was or should have been raised in the prior Petition denied in this case (Record No. 96-574). Further, the United States Court of Appeals for the Fourth Circuit clearly had jurisdiction to enforce, through a writ of mandamus to the district court, the mandate of *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 584, 136 L. Ed. 2d 514 (1996), after this Court denied certiorari from that decision. Officer Hetzel's argument to the contrary has no merit.

OPINIONS BELOW

This Petition purportedly seeks review of an unreported decision of the Fourth Circuit Court of Appeals on September 12, 1997, issuing a writ of mandamus to the United States District Court for the Eastern District of Virginia, Alexandria Division. The writ was issued to stay the new trial improvidently ordered by the district court in another unreported decision on June 23, 1997. The district court's June, 1997, order vacated an earlier order, again unreported, of December 20, 1996. All three orders are attached to the Petition, as Appendices D, A, and B, respectively. For the Court's convenience, citations to these opinions will be to the Appendix of the Petition.

The substantive issues raised in this Petition challenge the Fourth Circuit decision which the writ of mandamus was merely issued to reiterate, *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 584, 136 L. Ed. 2d 514.

Finally, the writ of mandamus referred the district court to the mandate of *Hetzel* ordering it to recalculate damages. On December 23, 1997, the district court did in fact enter a judgment of damages amounting to $15,000. A copy of that order is attached as Appendix A to this Opposition.

STATEMENT OF JURISDICTION

To the extent that this Petition, on its face, is a challenge to the issuance of a writ of mandamus by the Fourth Circuit, this Court has jurisdiction for the reasons set forth in the Petition's Statement of the Basis for Jurisdiction.[1] To the extent that the September 12, 1997, order of the Fourth Circuit is a final order, this Court would also have jurisdiction over a challenge to that order under 28 U.S.C. § 1254(1).

However, for the reasons set forth below, this Petition is actually a challenge to a decision rendered by the Fourth Circuit Court of Appeals on July 11, 1996, which has already been subject to review by this Court. Therefore, pursuant to the provisions of 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of this Court, this Petition is filed too late. Further, this Petition raises issues which were, or should have been, raised in Officer Hetzel's first Petition from the July, 1996, decision. She may not raise them again here.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth verbatim in the Appendix. They are the Seventh Amendment to the Constitution of the United States, 28 U.S.C. § 1651 and 28 U.S.C. § 2106.

1. It does not appear, however, that the Petition complies with the requirement of Rule 11 of this Court's Rules that a "showing [be made] that the case is of such imperative public importance as to justify deviation from normal appellate practice to require immediate determination in this Court." However, although the Fourth Circuit's September 12, 1997, order of mandamus suggests a possibility that the Court will enter some further order, it disposes of all matters that were before the Fourth Circuit. Respondents are willing to assume, then, for purposes of this Petition, that the September 12, 1997, order is a final order.

STATEMENT OF THE CASE

Officer Hetzel has pressed the central claims of her Petition upon this Court before. (*Hetzel v. County of Prince William*, Record No. 96-574). With the exception of the district court's June, 1997, order granting a new trial and the Fourth Circuit's issuance of a writ of mandamus, which does no more than repeat the language of the opinion Officer Hetzel challenged in her first Petition for Writ of Certiorari, the facts and procedural posture of this case have not changed.

A. The Underlying Litigation

As this Court may recall, Officer Hetzel brought a civil rights and Title VII action against the Board of County Supervisors of Prince William County, Police Chief Deane, and two of her then-superior officers, in July of 1994.[2] The central claims of that case were unfounded allegations of gender and national origin discrimination and harassment.[3] Officer Hetzel claimed a total of $9.3 million in damages, requested an immediate promotion with an award of back pay and front pay, and sought an injunction against the Police Department. The jury found no discrimination or harassment and ruled for the County and Chief Deane on seven out of ten counts. However, it found against them on three counts of retaliation, awarding $750,000 in emotional distress damages.

2. These officers were completely absolved of any liability to Officer Hetzel by the jury.

3. In accordance with the provisions of Rule 15(2) of the Rules of this Court, respondents must point out that the assertion on Page 2 of Officer Hetzel's Petition that she "was, and remains, the only female Hispanic police officer in the Prince William County Police Department" is untrue. While she was the only female Hispanic police officer listed on the certified eligibility list for promotion to sergeant, she is far from having been the only Hispanic police officer in the Department, and she is *not* the only female Hispanic officer.

The County and Chief Deane sought judgment in their favor as a matter of law. In the alternative, they requested a new trial, which Officer Hetzel vigorously opposed on the grounds that the record was complete, free of error, and sufficient to support the verdict. The district court agreed, and denied the County's and Chief Deane's Rule 59 motion. The trial court granted a portion of their Rule 50 motion, directing a verdict in their favor on one count of retaliation under, and reducing the jury's award to $500,000.

B. The Appeal and the Fourth Circuit's Decision

Respondents appealed the district court's decision. The Fourth Circuit, in a unanimous panel decision, determined that the verdict of $500,000, which was based almost entirely on Officer Hetzel's vague, conclusory and self-serving testimony, was outrageous and amounted to a gross miscarriage of justice.

The Fourth Circuit analyzed the record and ruled as a matter of law that almost all of the evidence the trial court said supported an award of $500,000 in emotional distress damages was legally incompetent for that purpose, and that the trial court had failed to give due consideration to other evidence in the record that Officer Hetzel really had no substantial damages. The Fourth Circuit went on to find that, on the record in this case, any amount of damages out of line with damage awards in two other, similar reported cases would be excessive as a matter of law.[4] It, therefore, reversed and remanded the case to the

4. *Bradley v. Carydale Enter.*, 730 F. Supp. 706, 726-27 (E.D. Va. 1989) (plaintiff received $9,000 for emotional distress damages caused when her landlord used racial epithets against her and tried to evict her in retaliation for her complaints of discrimination) and *McClam v. City of Norfolk Police Dep't.*, 877 F. Supp. 277, 284 (E.D. Va. 1995) (police detective received $15,000 in emotional distress damages on his claims of retaliation for complaints of discrimination).

district court for recalculation of damages using the guidelines set forth in the panel opinion. *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 584, 136 L. Ed. 2d 514, July 11, 1996.

C. Officer Hetzel's First Petition for a Writ of Certiorari

Officer Hetzel did not seek an *en banc* rehearing before the Court of Appeals, petitioning this Court for a writ of certiorari instead (Record No. 96-574). She argued in that Petition that the Fourth Circuit, in establishing the legal limit of damages available to her on the trial record, had exceeded its jurisdiction under the Seventh Amendment to the United States Constitution.

This Court denied Officer Hetzel's first Petition without comment on December 9, 1996.

D. Proceedings Giving Rise to this Writ

With the Fourth Circuit's decision made final and operative by the denial of a writ of certiorari, on December 9, 1996, this case returned to the district court for further proceedings. On December 16, 1996, Officer Hetzel filed a request for a new trial, based on her view that her post-appeal position was indistinguishable from that of a plaintiff being offered remittitur of a jury award by a trial court. Her motion indicated that she intended to reject *any* recalculated amount of damages lower than $500,000, and she, therefore, demanded a new trial. The County and Chief Deane opposed this motion, arguing that granting a new trial would disobey the Fourth Circuit's mandate.

On December 20, 1996, the trial court entered an order awarding Officer Hetzel $50,000, which the trial court again said during the hearing was based on evidence already

specifically disapproved by the Court of Appeals.[5] (A copy of the transcript of the December 20, 1996, hearing is attached as Appendix B to this Opposition, *see also* Petition, Appendix B). The order also directed Officer Hetzel to file a motion for a new trial if she decided not to accept this award. The trial court told the parties during the December 20, 1996, hearing that it would deny such a motion because it did not believe it had jurisdiction under the Fourth Circuit's mandate to order a new trial. Pursuant to the trial court's order, Officer Hetzel filed another motion for a new trial, to which the County and Chief Deane filed yet another opposition.

Believing that the trial court would immediately issue an order denying the new trial motion, as it said it would, the County and Chief Deane noted an appeal from the December 20, 1996, order entering judgment, on the grounds that an award of $50,000 in damages, based on the reasons stated by the trial court which had already been disapproved by the Fourth Circuit, disobeyed the July, 1996, Fourth Circuit mandate. When the trial court's decision on the new trial motion was not forthcoming, the appeal was stayed.

After a lapse of some six months, the trial court suddenly issued an order on June 24, 1997, vacating the December 20, 1996, order and granting Officer Hetzel a new trial. (*See* Petition, Appendix A). In that order, the trial court provided Officer Hetzel

5. The trial court again stated that one of the two primary reasons justifying a large award of damages was that fact that Officer Hetzel cried at counsel table during most of the trial. The trial court also stated that the other primary reason supporting a large award was the fact that some of Officer Hetzel's coworkers knew that she had cried after being interviewed by Internal Affairs. The judge took judicial notice that Officer Hetzel *must*, therefore, have been diminished in their eyes, despite the direct testimony of those coworkers at trial that the knowledge that Officer Hetzel had cried did not lower their opinion of her. (*See* Appendix B to this Opposition, 11a-14a).

the opportunity to take additional discovery, presumably so that she would be in a better position to produce some competent evidence of significant emotional distress damages at re-trial.[6] The County and Chief Deane immediately petitioned the Fourth Circuit for a writ of mandamus and, in the alternative, amended their previously-filed notice of appeal.

The Fourth Circuit granted the petition and issued a writ of mandamus to the district court on September 12, 1997. (*See* Petition, Appendix D). The mandamus referred the district court to the earlier mandate, ordered it to recalculate damages and attorney's fees, and reminded it of the earlier direction to

> closely examine the awards in *Bradley v. Carydale Enter.*, 730 F. Supp. 709, 726-27 (E.D. Va. 1989) and *McClam v. City of Norfolk Police Dep't.*, 877 F.Supp. 277, 284 (E.D. Va. 1995), which we believe are comparable to what would be an appropriate award in this case.

(Quoting *Hetzel v. County of Prince William*, 89 F.3d 169, 173 (4th Cir. 1996)) (Petition, Appendix D at 25a).[7]

6. Officer Hetzel was given an incredible amount of discovery before the first trial. The Respondents turned over more that 750,000 documents. In return, Respondents asked that she describe her emotional distress damages in discovery, and this is the evidence that was admitted at trial. Testimony in the first trial went on for eight days. If she was unable to prove any thing more than the "pittance" in emotional damages the Fourth Circuit found she was entitled to under these circumstances, it is absolutely inconceivable what better proof she would be able to produce in a second trial.

7. Following this direction, the district court entered judgment on December 23, 1997, awarding Officer Hetzel $15,000 in compensatory damages for emotional distress. (*See* Appendix A to this Opposition).

Officer Hetzel then filed this second Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This second Petition for a Writ of Certiorari is a transparent attempt to get a another bite at the apple before this Court on the very issue this Court put to rest in denying Officer Hetzel's first Petition.

Over a year ago, Respondents were before this Court on Officer Hetzel's challenge to the Fourth Circuit's July 11, 1996, mandate as inappropriate and beyond that court's jurisdiction under the Seventh Amendment. This Court denied the writ by Order entered December 9, 1997. Today, Officer Hetzel tries to sneak that same challenge into this Court again by disguising it as a complaint about the Fourth Circuit's use of its power of mandamus. Her *real* complaint is still with the Fourth Circuit's July 11, 1996 mandate. [8]

8. Any doubt about her intentions is dispelled by the reasons she says this Court should grant certiorari. In the Petition's "Reasons for Granting the Writ," she claims that this Court must intervene to protect the right to trial by jury in the Fourth Circuit. It bears repeating that, in this case, it was the July 11, 1996, decision which ordered recalculation of damages without referring the matter to a new jury, not the writ of mandamus.

She suggests further in her "Reasons for Granting the Writ" that the Fourth Circuit Court of Appeals is running amok and substituting its factual determinations of damages for jury determinations in cases where plaintiffs have prevailed on the liability issue. In support of this bold suggestion she mischaracterizes the Fourth Circuit's decision in two recent cases. She alleges that in those cases, "the Fourth Circuit also rejected the properly-instructed juries' assessment of damages and liability in employment related civil rights cases."

(Cont'd)

In order to obtain the relief she seeks, which is to be relieved of the legal constraints placed on her recovery of damages by the Fourth Circuit, Officer Hetzel must convince this Court to rewrite the Fourth Circuit's 1996 decision. Her Petition should be denied.

I.

THE FOURTH CIRCUIT'S ISSUANCE OF A WRIT OF MANDAMUS TO ENFORCE ITS JULY 11, 1996, DECISION WAS APPROPRIATE.

The Petition, taken at no more than face value, challenges the Fourth Circuit's right to issue a writ of mandamus to enforce its earlier mandate in this case. The Fourth Circuit clearly had that right, and the Petition should be denied for this reason alone.

As a general matter, the Courts of Appeals are authorized to issue writs of mandamus in appropriate cases by the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of

(Cont'd)

In *Grier v. Titan Corp.*, 121 F.3d 698 (4th Cir. 1997) (Table Case) (a copy is attached as Appendix 29a to this Opposition), the Fourth Circuit did no more than affirm a trial court's decision to set a jury verdict aside. In *Gill v. System Planning Corp.*, 121 F.3d 698 (4th Cir. 1997) (Table Case) (a copy is attached as Appendix 34a to this Opposition) the Fourth Circuit determined, as a matter of law, that the plaintiff failed to demonstrate required elements entitling her to a liability verdict. Of course, the jury verdict in that case had to be set aside under those circumstances.

Any suggestion that the Fourth Circuit imposed its naked factual judgment as to the award the plaintiffs should receive in these cases, or any suggestion that these cases show that the Fourth Circuit is either ignorant of or unimpressed by the Seventh Amendment is simply dishonest.

Appellate Procedure. The question is, then, whether this was such an "appropriate case."

Although Officer Hetzel will barely acknowledge the fact in her Petition, the Fourth Circuit did *not* remand this case to the district court generally. Rather, it provided an affirmative mandate, in the form of direct instructions to recalculate damages:

> Here, the award of $500,000 was grossly excessive when compared to the limited evidence of harm presented at trial and would result in a "serious miscarriage of justice" if upheld. Accordingly, we set aside the damage award and remand the case to the district court for recalculation of the award of damages for emotional distress. Upon remand, the district [court] should closely examine the awards in *Bradley v. Carydale Enter.*, 730 F.Supp. 709, 726-27 (E.D.Va. 1989) [award of $9,000], and *McClam v. City of Norfolk Police Dep't*, 877 F.Supp. 277, 284 (E.D.Va. 1995) [award of $15,000] which we believe are comparable to what would be an appropriate award in this case.

Hetzel, 89 F.3d at 173 (non-relevant footnote omitted). In entering an award of $50,000 and granting Officer Hetzel a new trial when she rejected that amount, the district court clearly disobeyed these instructions.

This Court has ruled on several occasions that, when a lower court appears to have disobeyed or misconstrued a higher court's determination of a given case, the appropriate remedy is a petition for a writ of mandamus or prohibition to the higher court. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978); *In re Potts*, 166 U.S. 263, 17 S.

Ct. 520, 41 L. Ed. 994 (1897) (overruled on other grounds: *Standard Oil Co. v. United States*, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976)); *Perkins v. Fourniquet*, 55 U.S. 328, 14 L. Ed. 441 (1853).

In *Vendo Co.* this Court held, with respect to its own power of mandamus, and the procedure that should be followed when a lower court misconstrues an appellate court's mandate:

> We believe that the parties are correct in treating this as an action for mandamus, which is available to a party who has prevailed in this Court if the lower court "does not proceed to execute the mandate, or disobeys or mistakes its meaning . . ." *United States v. Fossatt*, 21 How. 445, 446, 16 L. Ed. 185 (1859). Put another way,
>
> > [w]hen a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. *The Circuit Court is bound* by the decree as the law of the case; and must carry it into execution, according to the mandate . . . If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action *may be controlled*, either upon a new appeal (if involving a sufficient amount) or *by a writ* of mandamus to execute the mandate of this *court*.
>
> *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414 (1895).

434 U.S. at 427-428, 98 S. Ct. at 703-704, 54 L. Ed. 2d at 662, (emphasis supplied).

This Court's decisions in *Vendo Co.* and *Sanford Fork & Tool Co.*, bear directly on the question of whether the power to issue the writ of mandamus was appropriately invoked in this case. They establish the Fourth Circuit's clear jurisdiction in this regard, and remove any doubt that the Fourth Circuit could issue the writ in this case when it found that the lower court had not executed its July 11, 1996, mandate.

In contrast, the cases Officer Hetzel cites in her Petition, including *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980), deal only with the question of whether mandamus can be issued when a trial court sets aside a verdict and orders a new trial itself. Those cases do not involve appellate mandates, or disobedience of those mandates. Those cases simply do not apply.

II.

OFFICER HETZEL CANNOT CHALLENGE THE FOURTH CIRCUIT'S ENFORCEMENT OF ITS JULY 11, 1996 MANDATE.

Because the Fourth Circuit clearly had jurisdiction to issue the writ of mandamus, the only real question raised by Officer Hetzel's Petition is whether the mandate itself, that the district court recalculate damages without offering Officer Hetzel a new trial, is appropriate. Even if this Court had jurisdiction to entertain this question, it should not do so.

First, the mandate itself comes from the July 11, 1996, Fourth Circuit opinion. It did not originate in September 12, 1997, writ of mandamus, which reiterates the operative language of the 1996 opinion. (*See* Petition, Appendix D at 24a-25a). Had the July 11, 1996, mandate not become final and operative upon this Court's denial of Officer Hetzel's first Petition for Writ of

Certiorari, it is far too late now, some eighteen months after the fact, to seek review of that mandate. The fact that the Fourth Circuit was required, due to the district court's disobedience of its mandate, to engage in further proceedings to enforce its decision, does not extend the time within which Officer Hetzel was required to challenge the decision itself. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 43 S. Ct. 458, 67 L. Ed. 719 (1923).

Further, Officer Hetzel had the opportunity to challenge the mandate in her first Petition, and, indeed, she did urge this Court to reverse the Fourth Circuit on Seventh Amendment grounds. To the extent that her current argument was not subsumed in her first argument, she waived it in any event by not specifically raising it.

Second, even if this Court had jurisdiction to entertain, at this late date, a challenge to the Fourth Circuit's July 11, 1996, action, Officer Hetzel's argument that the mandate violates the Seventh Amendment is simply wrong.

A Court of Appeals can, consistent with the Seventh Amendment, instruct a lower court to recalculate damages without ordering a new trial. According to 28 U.S.C. § 2601:

> The Supreme Court or any other court of appellate jurisdiction may affirm, *modify*, vacate, set aside, or reverse *any judgment*, decree, or order of a court lawfully brought before it for review, and may remand the cause *and direct the entry of such appropriate judgment*, decree, or order, *or require such further proceedings to be had as may be just under the circumstances.*

(Emphasis supplied).

Against this clear language, Officer Hetzel claims that the Seventh Amendment entitles her to a second trial, *for no other reason* than because the record of the first trial will not, as a matter of law, support the dollar amount of damages she wants. She relies on the holding in *Kennon v. Gilmer*, 131 U.S. 22, 9 S. Ct. 696, 33 L. Ed. 110 (1889), for this proposition. Her reliance is misplaced.

In *Kennon*, an appellate court held that an entire trial record was tainted with passion and prejudice against the defendants, yet went on to use that very record to arrive at a specific dollar judgment against those same defendants. The Supreme Court reversed, remarking that this action was, at that time, unprecedented, as Officer Hetzel notes on pages 6-7 of her Petition. However, Officer Hetzel does not refer to the flaw this Court found in the appellate court's reasoning which required the reversal. The appellate court held that the record in that case supported *both* the conclusion that the trial was unfair to defendants *and* a significant award of damages should still be made against those same Defendants. This Court found that reasoning illogical and sent the case back for a new trial. *Kennon*, 131 U.S. at 28, 9 S. Ct. at 698, 40 L. Ed. at 113.

This Court did not hold in *Kennon*, as Officer Hetzel would have us believe, that Courts of Appeals are prohibited by the Seventh Amendment from issuing mandates preventing the retrial of thoroughly and, at least as far as Officer Hetzel asserted post-trial and on appeal, fairly tried facts.

Further, this Court has more fully and more recently elaborated its views on whether Courts of Appeals can issue mandates which dispose of factual issues on appeal. In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967), *reh. denied*, 386 U.S. 1027, 87 S. Ct. 1366, 18 L. Ed. 2d 471 (1967), the Supreme Court rejected a

Seventh Amendment challenge to a Court of Appeals' decision to remand a case to the trial court for entry of judgment for the defendant. While the analogy between an appellate court's right to grant judgment n.o.v. (which was at issue in *Neely*) and an appellate court's right to order a trial court to recalculate damages based on the existing record is not perfect, this portion of the *Neely* holding is useful here:

> In the case before us, petitioner won a verdict in the District Court which survived respondent's motion for judgment n.o.v. In the Court of Appeals the issue was the sufficiency of the evidence, and that court set aside the verdict. Petitioner, as appellee, suggested no grounds for a new trial in the event her judgment was reversed, nor did she petition for rehearing in the Court of Appeals, even though that court had directed a dismissal of her case. Neither was it suggested that the record was insufficient to present any new trial issues or that any other reason required a remand to the District Court. Indeed, in her brief in the Court of Appeals, petitioner stated, "This lawsuit was fairly tried and the jury was properly instructed."

386 U.S. at 329-330, 87 S. Ct. at 1080, 18 L. Ed. 2d at 85. Based on those circumstances, this Court held that the *Neely* Court of Appeals was justified in not permitting the district court to grant a new trial.

The circumstances presented to the Fourth Circuit in this case in July of 1996, were remarkably similar to the facts of *Neely*. Officer Hetzel, too, urged the Fourth Circuit to confirm the jury's verdict, on the grounds that the record fully supported it, that the facts were fully and fairly tried, and that the jury was properly instructed. In fact, she has never, throughout the course

of this litigation, presented any grounds for why the record of the first trial should be thrown out, other than her desire for a larger verdict than the Fourth Circuit will permit her to recover if she is limited to the evidence she presented at the first trial.[9]

In sum, Officer Hetzel found *no* fault with the conduct of the first trial until she learned that the Fourth Circuit would not countenance a verdict which was clearly excessive as a matter of law. The Court of Appeals was fully justified, under the Constitution, the United States Code, and prior opinions of this Court in preventing Officer Hetzel from using the first trial of this case, enormously expensive and time-consuming as it was, as nothing more than a dry run or dress rehearsal for another attempt to score a huge verdict with no material evidence against these Respondents.

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9. It is worth noting, as a practical matter, that it will be impossible for her to produce any evidence which does away with the most important "deficiencies" the Court of Appeals found in her claim for damages against the County. In holding the verdict excessive, the Fourth Circuit pointed to the fact that Officer Hetzel is still an officer in good standing with the Police Department, who has not suffered actionable discrimination or harassment. She did not seek medical or professional treatment of any kind for her claimed emotional injuries. She herself, in testimony, attributed much of her emotional distress to her erroneous impression that she was the victim of discrimination. She cannot produce evidence that does away with these facts. A second trial of this case would be a sheer waste of judicial resources.

CONCLUSION

This Petition should be denied because the only real issue it raises is a challenge to an eighteen-month old decision of the Fourth Circuit Court of Appeals which has already been subject to review under the Seventh Amendment by this Court and rejected. Further, Officer Hetzel's challenge to the Fourth Circuit's mandate, even if it were timely or on an issue she had not already waived, is meritless.

Respectfully submitted,

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**Counsel of Record*

APPENDIX

APPENDIX A — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA FILED DECEMBER 23, 1997

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

CASE NUMBER: CA 94-919-A

JANICE E. HETZEL,

PLAINTIFF,

V.

COUNTY OF PRINCE WILLIAM, ET AL

DEFENDANTS

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that a judgment in the total amount of $15,000 be and is entered in favor of plaintiff, Janice Hetzel, against the defendants, the Board of County supervisors of Prince William County, Virginia; and Charlie T. Deane, Prince William County Police Chief.

December 24, 1997
Date

Norman Meyer, Jr.
Clerk

s/ Raymond Hinder
(By) Deputy Clerk

Appendix A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 94-919-A

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Defendants.

ORDER

The procedural history of the post-trial litigation in this action is described in this Court's Memorandum Opinion entered on June 24, 1997. After that Opinion and accompanying order issued, defendant appealed the Court's decision to set a new trial date for a retrial of the damages issue, and, in the alternative, petitioned for a writ of mandamus. The former relief was denied because the appeal was deemed interlocutory in nature and the latter was granted. On September 15, 1997, the Fourth Circuit stayed the retrial of the damages issue and ordered this Court to recalculate the plaintiff's damage award for emotional distress. This Court was further ordered to enter final judgment on the damages issue and in so doing to "closely examine" the damage awards made in *Bradley v. Carydale Enter*, 730 F. Supp. 709, 726-27 (E.D.Va. 1989) and *McClam v. City of Norfolk Police Department*, 877 F. Supp. 277, 284 (E.D.Va. 1995) which awards

Appendix A

the appellate court believed to be "comparable to what would be an appropriate award in this case."

The Court has carefully reviewed the two decisions cited in the original opinion and in the Order. *Bradley*, 730 F.Supp. 709, was a bench trial involving claims by an African American plaintiff that her landlord had discriminated against her on the basis of race by ignoring her claims of racial harassment and then retaliated against her because she had complained about the harassment. The Court found against plaintiff on her discrimination claim but also found that she had made out a claim of retaliation. In awarding plaintiff $9,000 total damages for her retaliation claim, the Court found that the plaintiff, "a quiet person who tends to stick to herself" was "deeply wounded" by being called "a nigger." *Id.* at 726. She became teary on the stand even three years after the events. The trial court also found that plaintiff had been humiliated and embarrassed, and had become restless. But he also found that her damages had to be limited because she continued to live in the apartment building, never sought counseling, medical treatment or lost work time. *Id.* at 727.

In *McClam*, 877 F.Supp. 277, another bench trial, a police officer alleged that because of retaliation for filing racial discrimination complaints his department denied him a requested transfer. The trial court found that plaintiff had made out a case of retaliation and awarded plaintiff $900 in compensatory damages for tangible damages (lost pay supplements) and $15,000 in intangible damages for headaches, difficulty with sleeping, lowered self esteem and feelings of not wanting to go to work, which the Court found were damage awards consistent with what other courts had awarded for intangible injuries resulting from violations of civil rights. *Id.* at 284.

Appendix A

In light of the Order of September 15, 1997, we conclude that the Fourth Circuit has directed this Court to enter a judgment in plaintiff's favor in an amount somewhere between $9,000 and $15,000. Because this plaintiff was reduced to tears in front of some co-workers while at work when retaliatory disciplinary proceedings were instigated against her, that anguish and humiliation justify an amount at the high end of the range found appropriate by the Fourth Circuit. For these reasons, it is hereby

ORDERED that a judgment in the total amount of $15,000 be and is entered in favor of plaintiff, Janice Hetzel, against the defendants, the Board of County Supervisors of Prince William County, Virginia; and Charlie T. Deane, Prince William County Police Chief.

The Clerk is directed to forward copies of this Order to counsel of record and to enter a judgment, pursuant to Fed. R. Civ. P. 58 in favor of plaintiff.

Entered this 23rd day of December, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United Stated District Judge

APPENDIX B — TRANSCRIPT OF MOTION PROCEEDINGS DATED DECEMBER 20, 1996

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION
NO. 94-919-A

Alexandria, Va.
December 20, 1996

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, et al.,

Defendants.

VOLUME I OF I
TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Charlson & Bredehoft, P. C.
By: ELAINE C. BREDEHOFT, ESQ.
11260 Roger Bacon Drive, Suite 201
Reston, Virginia 22090

Appendix B

For the Defendants: County Attorney's Office
By: SHARON E. PANDAK, ESQ.
1 County Complex Court
Prince William, Virginia 22192

DiMuro, Ginsberg & Lieberman
BY: BERNARD J. DiMURO, ESQ.
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Alexandria, Virginia 22314

* * *

[3] P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Civil Action No. 94-919-A, Janice E. Hetzel vs. County of Prince William, et al.

MS. BREDEHOFT: Good morning, Your Honor; Elaine Bredehoft representing the plaintiff, Janice Hetzel.

THE COURT: Ms. Bredehoft.

MS. PANDAK: Good morning, Your Honor; Sharon Pandak representing the defendants.

THE COURT: All right, good morning.

All right, before me is the plaintiff's motion to set a trial date and for ancillary relief.

I think, frankly, Ms. Bredehoft, that motion is probably miscaptioned, because I have looked very carefully at this Fourth Circuit opinion; and I have looked at your brief, the reply brief, your reply brief to that and the County's response to that.

Appendix B

This case is in a very unique posture, and I have looked at cases cited by the Fourth Circuit and other ones as well. I don't think any of them were in quite the posture that this case is in, because what we have here is civil case where the jury came in with an award. I set part of it aside, but it basically still left a large part of it in place.

The Court of Appeals affirmed all of the legal rulings of the trial, found no defects in the trial itself, [4] no problems in the jury instructions or the evidentiary calls, but set aside the verdict in the case finding that the amount of compensatory damages awarded by the jury were excessive and, in effect, resulted in a miscarriage of justice based upon the evidence and the causes of action that were left in the case. That's what the Fourth Circuit has done.

The Fourth Circuit explicitly reversed the judgment of the District Court and remanded the case for recalculation of damages for emotional distress and also recalculation of attorneys' fees, and that is the limit of what the remand to this Court has.

I read the Fourth Circuit's direction to me to tell me I am to do two things and only two things, and that is to set a new amount of damages and then to recalculate the attorneys' fees.

I see nothing in this opinion that tells me that I am to conduct a new trial because, in fact, the original trial has been affirmed by the Court of Appeals.

And even though, Ms. Bredehoft, you have very articulately argued that this Court is, in effect, going to to be ordering a remittitur and that under the 7th Amendment and the case law

that you cite, when a remittitur is presented to a party, that party has the option of accepting the remittitur or rejecting it and then going to [5] a new trial, I can't find that latitude in the way in which the Fourth Circuit has returned the case to me.

I believe that's pretty much the position that the County has taken, and that is that, in fact, all this Court is authorized to do is to set a new damage figure; and that's it, and attorneys' fees.

What I am going to do is the following: I am, in fact, going to set or recalculate the damages, and I am going to announce that this morning from the Bench.

On the attorneys' fees, to be honest with you, I didn't get enough time to look over those numbers again in Chambers, but they would obviously be connected to or related to the amount of damages that I recalculate.

I have looked very hard at this case. I tried it. It was an eight-day trial. I have some real concerns, because I think this was a very intelligent jury, and, counsel, you can correct me if I am wrong, but isn't this the case where, after the trial, at least one juror contacted counsel and wanted to talk to you all?

MS. PANDAK: That is correct, Your Honor.

THE COURT: All right. Did that same juror — and did you talk to the juror?

MS. PANDAK: Yes, Your Honor.

THE COURT: Did the juror talk to plaintiff's counsel as well, Ms. Bredehoft?

[6] MS. BREDEHOFT: Not that juror. Another juror contacted me, Your Honor.

THE COURT: Can you share with me what the jurors said? I am just curious. I don't want to know who said what, but just basically what did they say?

MS. PANDAK: I apologize to the Court. My memory is a bit dim on this.

THE COURT: Mr. DiMuro is here. I think he actually was the person who called me.

All right, Mr. DiMuro?

MR. DiMURO: Excuse me for not being here earlier, Judge. Judge Ellis just took a break.

That juror said that when it came to — he gave us some sense of how they broke down on the loss claims, but when it came to the retaliation claim and the size of the verdict, a small minority of jurors did not want to go for the plaintiff even on the retaliation claims and that he was the most vocal of that, I think, two-person block; but he finally gave in, because he thought he knew that judges would sometimes take away verdicts and reduce them and fix the problem.

We carefully looked at the rules relating to when do you bring what jurors say back to the Court, and, while I thought that that matter was a significant insight, I couldn't infer — Ms. Pandak and I could not in good faith [7] say that that fits within the law that permits you to bring that to the Court's attention, so we did not. But he did indicate he had trouble, significant trouble, with the verdict.

THE COURT: Did he give an idea of what he thought the verdict should have been?

MR. DiMURO: Zero. He didn't think the plaintiff should prevail on that matter.

I guess, I think we also confirmed that they meant to stack the quarter-million-dollar units, but you had already polled the jury on that.

THE COURT: I polled them on that.

MR. DiMURO: I believe so.

THE COURT: The poll was consistent with what he said, right?

MR. DiMURO: That is right.

THE COURT: Ms. Bredehoft, you spoke with a different juror then?

MS. BREDEHOFT: Yes, Your Honor, and I heard quite a different story. I guess thatch maybe one of the reasons why those aren't supposed to be considered by the Court. The juror who spoke with me called me on her own and indicated that the difficulty with the jury was that a significant number of them also wanted to find in our favor on discrimination and that they compromised, that everyone [8] believed that retaliation had occurred, but there was significant dispute on the discrimination claims.

I think she gave me the split, but, frankly, I can't remember

what the split was. So I don't want to represent it to the Court. But she talked about specific evidentiary issues and what they felt were significant and what they didn't think were significant. But at no time did she indicate that anyone did not want to give significant damages. It was an issue of whether there was also a finding on discrimination, the underlying discrimination.

THE COURT: All right. It's interesting. The only reason I have asked, frankly, I have already pretty much made up my mind on the recalculation, but I was just curious since it's not common for us to have jurors who were sufficiently interested in the case to go that step themselves to initiate contact with counsel.

As I recall, this was an eight-juror panel. It was more than the standard six, so there was a little bit more input. As you may know, there has been some talk about the need or the wisdom of going up to 12-person juries in civil cases. It has not passed, but one of the arguments for that is when you have more jurors, you have a wider cross-section of the community; and your civil judgments may have more sense of reliability or whatever. [9] And so I do note that it is interesting that we had more than the six giving their judgment in this case.

I looked very carefully at the cases that the Fourth Circuit pointed me to in terms of similar damage awards, which they have suggested I look very seriously at, and I did.

On the other hand, I still believe that every case is its own unique case. Every plaintiff brings his or her own set of issues to a trial, and there is nothing that I find in any of the law that says that there are automatic limits on damage awards for particular causes of action of this sort. In the civil-rights area,

each case is a fact-specific case, and that's the way our system works.

The Fourth Circuit, which did have a disadvantage in that it was looking at a cold record, did not seem overly impressed with my comment or observation that we had watched Ms. Hetzel for two days, and I watched her demeanor on the stand; and I am going to assume that I was not specific enough or articulate enough when I denied the defendant's motion for a new trial when I addressed that issue.

But, you know, we have jury instructions that we give — and they are completely approved by the courts of appeals — to a jury that, for example, the jury looks at the quality of the evidence, not the quantity, and in terms [10] of the testimony of witnesses, the testimony of one witness alone on a particular issue, if the jury finds that witness to be credible or more credible than the witnesses testifying to the opposite proposition, the jury has a right to believe that one witness' testimony even in the face of the testimony of seven or eight who will say the opposite.

We tell the jury that in making evaluations about the credibility of matters, that they need to look at, among other things, not just what a witness says but their demeanor on the stand. It is not inappropriate — in fact, it is completely consistent with what we tell the fact finder — to take into consideration demeanor in evaluating the credibility of a witness.

Now, in Ms. Hetzel's case, we have a woman who has ventured into a predominantly male world. She was a Marine. There still are not that many women in the Marine Corps. Of course, the Marines pride themselves on being tough, and my

observation of Ms. Hetzel or Officer Hetzel is that she probably tries to be too tough; and I think some of the comments I may have made about how I think she in some respects may be her own worst enemy, and why I was reluctant to grant her the relief of the promotion was partly a result of that.

She is now in a police agency which, of course, [11] is — the Fourth Circuit characterized it as a paramilitary agency — where again a sort of toughness is a value. And this woman, who is working in a predominantly male, tough male world, was reduced to tears not only in court, and my evaluation of those tears was that they were not crocodile tears. They were real. I think that the jury's verdict in part was consistent with their evaluation of the demeanor that I saw.

But there was also clear evidence in the trial, in the incident in the restroom, and the Fourth Circuit does note that in their opinion, from the corroborating witness, that in relation to the Internal Affairs business she was again reduced to tears, locked herself in the restroom, and I think it was the sergeant had to come in and get her.

That is a very significant incident in my view, which is not present in the other cases to the same degree. Of course, I didn't try those other cases that I was directed to look at. I tried this one. I saw this plaintiff. I heard this testimony. Her emotional distress has real.

For a woman who is trying to fight off the image of being soft, working in a man's world, to be reduced to fears at the workplace is a significant problem. I think that is a significant injury. Her image with those other [12] officers is affected by that.

And certainly, again, her deportment in court, I think, is something that was appropriate for the jury to look at.

Having said all that, I am satisfied that there is enough evidence in this record to support a damage award for the emotional distress, and I am going to enter an award of $50,000, which I am aware is higher than that of most of the cases that the Court of Appeals addressed me to, but I believe that in this case these facts, it's a fact-specific case.

As I said, given the fact that we tell jurors to look at the demeanor of witnesses, et cetera, and given the huge size of the judgment that they came up with, that $50,000 is not an outrageous amount nor is it an amount that cannot be justified from this record.

I also note that I have been involved in many settlement conferences and that a number in the $50,000 range has not been uncommon for settlements of cases involving allegations of retaliation and resulting emotional distress and mental anguish, and that sort of thing. So I think that this is a fair and appropriate number.

Now, Ms. Bredehoft, you have indicated, sort of doing a preemptive strike, in effect, with your motion that [13] your client is unwilling to accept a reduced amount. You didn't know what the reduced amount would be. Maybe you were looking at the cases that the Fourth Circuit had pointed me to. But does that decision of this Court in any respect change your position on your motion for a new trial?

MS. BREDEHOFT: Frankly, Your Honor, I would have to consult with my client before making that determination. I do

construe this as a remittitur. I think that does comport with our argument.

But I would need to consult my client on that before stating that in some way we reject or accept that. I understand Your Honor's ruling that we don't have a choice on that, but I would like to consult with my client.

THE COURT: I am going to give you something in addition to think about with your client, all right.

If your client does not accept the amount, I am not granting a new trial. So you can take this right back to the Fourth Circuit.

However, I want the record to be clear that if the Fourth Circuit determines that I am in error in not giving you the option of a new trial, because as I said, as I literally read their decision, I don't have that, they have not asked me to do that.

The new trial that I would conduct, so that we [14] can get it all resolved at one time, would be limited to the issue of a trial on damages. In other words, the Fourth Circuit has already found that the liability was properly established, so we would not go back into equal protection or anything else.

The parameters of the trial would be, number one, I would tell the jury that there has already been a finding — I don't know how I would tell them — but effectively that the County did retaliate against the plaintiff in these two specific areas, where the Fourth Circuit has said it is properly supported by the evidence; and I would tell the jury that it's going to be their job to determine whether or not any compensatory damages are appropriate for the emotional distress component. All right?

And, although I will probably give you a little bit of leeway on discovery, your damages are limited to the day the trial started.

After the trial, it's not fair in my opinion or appropriate to bring in additional damages. I would not permit that. If your client is suffering additional damages, I think the appropriate remedy is to file a new lawsuit. But this case, if it goes to a retrial, is simply a retrial based upon those parameters.

Is that clear for the County as well?

MS. PANDAK: Yes, Your Honor. I understand that [15] aspect of the ruling.

THE COURT: I think it's important for that to be before the Fourth Circuit, because if they do decide that I had to give you the option for a new trial, then I actually am hoping that they will also address, and that you can complain to them that these are the parameters, because you are asking for much more than that. You are asking, as I understood your pleadings, to get into discovery.

I think you mentioned there had been ongoing problems for your client in terms of other things that had been happening to her in the form of retaliation, or that her emotional distress may have gone on after the trial. I don't think it's appropriate to bring that in in this context. As I said, maybe there is a new lawsuit out there.

I am just giving everybody notice as to what I would be doing. And to the extent that I am trying to reduce the amount of times this case goes back and forth, that way at least the

Court of Appeals has an opportunity to see what I would have in mind for a new trial. And to the extent that you don't agree with that, Ms. Bredehoft, or frankly, that the County doesn't agree with that, that that could be as well briefed for the Court.

MS. BREDEHOFT: Your Honor, may I ask a question of clarification on that? Would that also, would Your [16] Honor's ruling also then restrict so that the jury would be told they are only to assess damages up to January 23, 1995, and that there can be no testimony of any nature subsequent to January 23, 1995?

THE COURT: Correct.

MS. BREDEHOFT: So, for example — I was just trying to think of a couple of examples. Let's say Janice Hetzel went up and gave Chief Dean a big kiss and hug a year later, that would not be something that they could do — I'm sure it didn't happen — but I'm trying to think —

THE COURT: (Interposing) It would apply to both sides. In effect, the case is limited to the parameters of the case.

MS. BREDEHOFT: That's what the jury would be told under Your Honor's ruling?

THE COURT: Right.

MS. BREDEHOFT: Thank you, Your Honor.

THE COURT: In terms of attorneys' fees, I haven't looked at that yet. Obviously, I cannot and will not impose a higher attorney fee than the recovery. And obviously there has been a significant diminution.

I think what I am probably going to do is basically a percentage that would be consistent with the percentage reduction.

Now, I reduced in effect the jury award, I [17] believe, by 90 percent. Aren't we down to ten percent? It was $500,000. I think the most appropriate way to do it, because I did spend a lot of time, as I recall, going over all your calculations, I am simply going to reduce the attorneys' fees 90 percent as well. That won't make you very happy, but at least that way you got closure today.

MS. BREDEHOFT: There is a specific Supreme Court decision that rejects the notion of doing a percentage, Your Honor. I would like to be able to argue that if Your Honor is inclined to. For example, we just had a case in this court in which our retaliation recovery was $55,000, and Judge Cacheris awarded, I believe, $60,000 in attorneys' fees and costs. We had another in which the award was $85,000 and Judge Bryan awarded the attorneys' fees of somewhere in that same neighborhood of $60,000.

THE COURT: I will permit you to rebrief that issue. Then the County will have an opportunity to rebrief that as well.

MS. BREDEHOFT: Thank you, Your Honor.

If you would like to give us deadlines to do that, I am happy to do that today as well. It is the holiday, so —

THE COURT: (Interposing) January 10th for the plaintiff's brief to be in.

Does the County think it could respond within a [18] week? Or is that not giving you enough time?

MS. PANDAK: Your Honor, it is seven working days, but I think five days might be too short.

THE COURT: All right. Let me give you two weeks. There is no rush on this case, is there, for anybody? So that would give you until the 24th, right; 10 and 14 is 24.

Then we get your response on the issue of attorneys' fees.

Does the County want to be heard, just for the record?

MS. PANDAK: Yes, Your Honor, I would like to be heard.

THE COURT: Yes, ma'am.

MS. PANDAK: Your Honor seems to have made up her mind, so this may be somewhat pointless. I would have to take exception to the setting of the damages.

I think that — but before going to that, I want to touch on what the Court has said with respect to the new trial so that I can understand in the event that that may come back. The Court said that you were going to give a little bit of leeway with respect to discovery, and I don't really understand what that means.

The case has had an incredible amount of discovery. I don't think I have found any case in which [19] there have been as many documents turned over as this one. Numerous depositions were taken. I am not sure what additional discovery there would be.

THE COURT: For example, I don't recall that Ms. Hetzel's husband testified. Many times in these cases of emotional distress, the plaintiffs will put on the spouse or close colleagues or family workers who will address the issue of what they noticed about the person's demeanor, whether they were having headaches.

I think part of the problem in this case, you know, one of the concerns I have got is I would hate to see this opinion used by plaintiff's counsel to go out and start getting all kinds of psychologists to start looking at their clients when the client hadn't gone to the psychologist while the events were going on.

It seems to me that a person or the people around a person can just as adequately testify if someone is, for instance, having sleepless nights, and it's not enough to go to a doctor, but you know the spouse is saying, "I can't sleep with my spouse anymore because she is up walking around all night." That's evidence which a jury could look at.

So all I am saying is the type of discovery that I would permit, and I see it as extremely limited, and, frankly, I would think your side might be more interested [20] in it than the plaintiff would be if she has additional witnesses that she plans to call to testify to her mental state in that time period, as it related to the retaliation business, then I would give you the opportunity, of course, to depose such people.

MS. PANDAK: Your Honor, we have deposed the plaintiff's husband, and, in fact, he didn't even know or had any feelings that there was any change in her. He knew about the suit only what he read in the paper. So we thought that it was not prudent to put somebody's husband on the stand on our own account.

THE COURT: Then there may not be much new discovery.

MS. PANDAK: That's my concern. The Court of Appeals did not talk about there being any amount of evidence. The plaintiff never argued it. So to now allow the plaintiff to bring in new evidence of what her damages might be seems to me to be inconsistent with the Fourth Circuit's ruling.

The second aspect of that is — and Ms. Bredehoft attempted to elicit from the Court as to when the time would stop in terms of evidence with respect to damages — I agree with the Court that she cannot bring any more damages evidence in of damages that she had prior to the trial than what she had at that point in time. And [21] certainly anything in the future would have to be the subject of a new action.

But I would note for the Court that the Court of Appeals took note, and this Court, I believe, took partial note, that with respect to what seemed to be the culminating event, this 1995 Internal Affairs investigation, that Ms. Hetzel had only an oral reprimand and a requirement to go get additional Miranda rights training. That was in the Fourth Circuit's opinion.

That was not a matter that was before the jury. In fact, we argued, as the Court will recall, that that investigation should not have been before the jury at all because it at that point had only been initiated, and she had suffered no damage. But I think that is something where, to avoid the problems with which the first trial was fraught, that because the Fourth Circuit cited in its opinion, that constraints would need to be put on a jury with respect to that particular item.

THE COURT: Those are fine evidentiary calls that I think

can only happen in the context of the trial. I wanted to give you all a heads-up on the broad parameters of the fact that it will be a significantly limited trial, limited solely on the issue of damages within a specific time period, and I think that is enough guidance.

MS. PANDAK: I appreciate that, Your Honor.

[22] Finally, Your Honor, with respect to the damage award, the County unfortunately will have to take that matter up again to the Fourth Circuit, not only because it's not within the parameters that the Fourth Circuit has set — and we had planned to brief to the Court, if the Court had chosen, a briefing schedule in advance of awarding the damages — that the lack of evidence when you view it simply from the retaliation end and simply from the perspective of the little injury that this plaintiff suffered, I think that unfortunately, with due respect to the Court, I think you fall afoul again of the various things that the Fourth Circuit has already pointed out with respect to this case.

The defendants believe that the damages based on what Ms. Hetzel suffered certainly don't even go near what was suffered in the McClan case and the Kerrydale case: Crying in the bathroom for 45 minutes, particularly when members of her squad testified that they felt she was still a colleague and didn't think her to be diminished at all in terms of their esteem for her.

THE COURT: But, you know, that's not really the issue. The issue is what she thought of it herself.

MS. PANDAK: Your Honor, I agree. Your Honor correctly noted when you rendered the decision on the judgment NOV request by the County that Officer Hetzel had [23] distorted

impressions of things. And, in fact, one of the reasons the Court refused to impose an injunction against the police department was the concern that Officer Hetzel would perceive anything as retaliation or discrimination in the future, based on the condition in which Your Honor found her.

Finally, Your Honor, I think also since both the McClan and Kerrydale cases, which the Fourth Circuit had to look at the time that they rendered the initial opinion, there have been opinions since that time that have come down with even smaller damage awards than the $3,000 to $5,000 range for injuries or lack of injuries of the type of emotional distress that Officer Hetzel speaks of.

I just wanted to note for the Court that we are troubled and unfortunately will have to probably take this up. I need to consult with my client, obviously.

THE COURT: One of the things I am going to suggest to both sides, too, is before you go back, I mean, certainly there are very interesting issues in this case. Frankly, I would be kind of interested in seeing what happens. You may also want to consider sitting down with a Magistrate Judge for a few minutes and resolving it. To me, the numbers are not so great any longer. There are transaction costs involved in appeals as well. So that's up to you all.

[24] But this case has certainly gotten a great deal of attention. I am still really concerned about the fact that we tell the jury certain things in our jury instructions, and then they act on that. And then I am concerned about some kind of mechanical, and I don't believe the Fourth Circuit actually has intended this, they wanted the Court to look with care and, as I said, I was

criticized, and properly so, for not giving more detail in my ruling on your motion for new trial; and that happens sometimes.

But, as I said, when you think about what we tell jurors, the fact finders, and the basis upon which they can make their decisions, and yet at the same time we are saying, yes, but the demeanor of the witness can't be believed in this respect or shouldn't be given this much credence. It does appear to me to be significantly inconsistent.

And the simple fact is I have looked very carefully at the other cases, and there certainly are more than just the two the Fourth Circuit cited me to. There has been at least one post-Hetzel case in the Fourth Circuit where they also supported a very, very low judgment, where again Hetzel was cited for that proposition.

But unless we are going to do away with the [25] concept of jury trials and juries setting damages, each case with each plaintiff and each set of witnesses is a unique, legal puzzle; and there must be great care taken not to start putting in mechanical rules or mechanical ceilings when there is simply no basis that I can see in the statutes for it.

The juries are told that compensatory damages must be based on reason. They are not to be based on suspicion or just pulled out of the air.

There are facts in this record which do support quite clearly a finding of emotional distress as a result of these actions. And, as I said, I think the jury is proper to look at a plaintiff, and in this case it wasn't just the plaintiff alone. Now, it wasn't overwhelming evidence, but there was clearly evidence there. I

have now been put in a position, and I have done it, of reducing that damage award.

You know, I recall that in centuries earlier, if a man's reputation were impugned, he would go to a duel to the death, just the fact that somebody is insulted. An Internal Affairs investigation, I think that anybody in the public sector who is even told they are under investigation, that's a terrible effect on a person.

The fact that the ultimate outcome was relatively de minimis doesn't change the fact that that was a very [26] significant impact on that person.

Look at the poor attorney we had in here earlier today who I had to sanction and how miserable he feels.

Now, you can argue, well, what price do you put on humiliation or that kind of human misery? It's the same problem you have in a pain-and-suffering case, in a personal-injury case or wrongful-death case. How do you put a price on that? And we ask juries to do that all the time.

I just think we have to be very, very careful in becoming too formalistic. I have looked at this case. I looked at this plaintiff. I looked at the totality of the evidence. I have restricted my view in the context of what is left of the case.

The 45-minute, crying-in-the-bathroom scene is a significant instance in this case, and the sergeant's concern about her was significant. And, as I have said, those are the kinds of reasons for which I think this number is not an unreasonable number, despite the fact that there are many cases out there that have given greatly reduced figures.

I suggest that you all, both sides, give some serious thought to thinking about the transaction costs and the other costs in further litigation. And if you want a Magistrate Judge to try to mediate a resolution with you [27] all, that's fine.

Otherwise, I have given you the briefing schedule, and I will see the briefs. I will set the attorneys' fees, and then you all decide what you want to do from there, all right.

MS. PANDAK: Thank you.

MS. BREDEHOFT: Thank you.

THE COURT: Ms. Bredehoft, what you are probably going to have to do, in addition to the attorneys' fees business, is after I have resolved that, then you are going to formally need to notify the Court about whether you accept the $50,000 or you want the new trial.

If you want the new trial, then I need to enter an order that formally denies it, puts in what I have just said in court, and then you can take the case up for further review.

MS. BREDEHOFT: We should wait until after Your Honor makes the decision on attorneys' fees and then make a decision. That makes sense.

THE COURT: Yes, because you need to let me know. At this point, I am not doing anything, having told you what I am going to do.

MS. BREDEHOFT: Thank you.

THE COURT: Thank you.

(Whereupon, the motion proceedings were [28] concluded, and court was recessed.)

APPENDIX C — CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS

§ 28 U.S.C. 1651 — WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 28 U.S.C. 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *GRIER V. TITAL CORPORATION*, 121 F.3D 698 (4TH CIR. 1997) DECIDED AUGUST 15, 1997

Celindah J. GRIER, Plaintiff-Appellant,

v.

The TITAN CORPORATION, Defendant-Appellee.

Celindah J. GRIER, Plaintiff-Appellee,

v.

The TITAN CORPORATION, Defendant-Appellant.

Nos. 97-1167, 97-1168.
United States Court of Appeals, Fourth Circuit.
Argued: July 7, 1997.
Decided: Aug. 15, 1997.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, District Judge; Albert V. Bryan, Jr., Senior District Judge. (CA-95-900-A)

* * *

Before LUTTIG and WILLIAMS, Circuit Judges, and Joseph F. ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Appendix D

OPINION

PER CURIAM:

Appellant, Celindah Grier, brought Title VII claims for constructive discharge and retaliation against her former employer, Titan Corporation. The claims were tried to a jury twice. The first jury awarded Grier both compensatory and punitive damages on her claims. Subsequently, the district court granted Titan's Rule 59 motion for a new trial on Grier's Title VII retaliation and constructive discharge claims, ruling that the jury's verdict was against the clear weight of the evidence.[1] Grier's claims were then tried to a second jury, which also returned a verdict for compensatory and punitive damages on both Grier's retaliation claim and her constructive discharge claim. The district court then entered judgment as a matter of law under Rule 50 for Titan on the constructive discharge claim and on the punitive damages award. The district court denied Titan's motion for judgment as a matter of law on Grier's retaliation claim, and also denied Titan's motion for a new trial.

This appeal followed. Grier appeals the trial court's grant of a new trial after the first trial; she also appeals from the district court's grant of judgment as a matter of law on her constructive discharge claim and punitive damages award after the jury verdict in the second trial. Titan cross appeals the court's denial of its Rule 50 motion on Grier's retaliation claim following the second trial.

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1. The district court also granted Titan's motion for judgment as a matter of law on Grier's claim for constructive discharge under Virginia law. Relying on our decision in *Hairston v. Multi-Channel TV Cable Co.*, 1996 WL 119916 (4th Cir. March 19, 1996) (per curiam), the court held that Virginia common law provided no such cause of action.

Appendix D

The district court granted judgment as a matter of law on Grier's constructive discharge claim because it concluded that, although "the record may be adequate for a reasonable trier of fact to find that defendant deliberately intended to force plaintiff to resign, it does not allow a reasonable trier of fact to conclude that plaintiff's work environment was objectively intolerable." District Court Order of Dec. 24, 1996, at 4. Grier's evidence demonstrated that her working conditions "may have been unpleasant and even subjectively intolerable," *id.* at 10, but did not — as required to prove constructive discharge — leave her "no choice but to resign." *Id.* at 4 (quoting *Blistein v. St. John 's College*, 74 F.3d 1459, 1468 (4th Cir.1996)).

Specifically, the district court found that any reduction in Grier's work opportunities "was not only prospectively temporary, but also quite brief." *Id.* at 7. Additionally, Grier's "chief reason for leaving" — Titan's failure to address both Grier's claims of retaliation and her underlying claims of gender discrimination — did not evidence an objectively intolerable environment. Rather, said the district court, Grier was attempting to "bootstrap tolerable conditions into an intolerable working environment by claiming that [the] employer responded inadequately to complaints concerning the tolerable workplace."[2]

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2. Moreover, we note that there was no evidence that Titan's failure to respond to Grier's underlying claims of gender discrimination was a targeted attempt to compel Grier to resign. *Cf. Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir.1989) (Wilkinson, J., concurring in part and dissenting in part) ("Although a failure to act in the face of known intolerable conditions may create an inference that the employer was attempting to force the plaintiff to resign, such an inference depends upon some evidence that the inaction of the employer was directed *at the plaintiff*.") (emphasis in original), *adopted by* 900 F.2d 27, 28 (4th Cir.1990) (en banc) (per curiam).

Id. at 8. Nevertheless, the district court also found that there was sufficient evidence for the jury to find that Titan had taken retaliatory measures against Grier, even though those actions — taken together — did not create an objectively intolerable workplace.

As to the punitive damages award, the district court held that there was "no evidence in the record that any retaliatory acts by defendant were conducted with malice, ill-will, spite or hatred." *Id.* at 11. Moreover, there was no evidence — beyond that required to show that Titan had intentionally retaliated against Grier — to demonstrate that Titan acted with "reckless indifference" to Grier's federally protected rights. *Id.* at 10-11. Reasoning that "the 'reckless indifference' standard for awarding punitive damages must require more than a showing of intentional retaliation" to avoid making punitive damages available in all retaliation cases, the district court granted judgment as a matter of law on Grier's punitive damage claim as well. *Id.* at 12.

In sum, after presiding over two complete jury trials of Grier's retaliation and constructive discharge claims, the district court was convinced that there was insufficient evidence to support Grier's constructive discharge claim and her punitive damage award. Of course, the fact that two successive juries found in Grier's favor counsels caution in setting aside the second jury's verdict as unsupported by the evidence. *See Massey-Ferguson Credit Corp. v. Webber,* 841 F.2d 1245, 1250 (4th Cir.1988). However, the district court was quite clear on the record below that it allowed Grier's claims to go to the jury the second time, not because it believed there was sufficient evidence to support them, but because it was concerned that this court would apply more lenient standards for constructive

discharge and punitive damages. Thus, the district court allowed the case to go to the jury so that there would be no need for a new trial if we disagreed with the court as to the proper standards to be applied to Grier's claims. JA at 6605, 6637.

Having reviewed the record, the arguments and briefs of counsel, and the order of the district court, we believe that the district court correctly applied the proper standards in this case, and we affirm on the reasoning of the district court.[3]

AFFIRMED.

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3. It is far from clear that the district court's grant of a new trial after the first jury trial is reviewable by us at this time. However, even assuming that the grant of the new trial is now reviewable, the district court did not abuse its discretion in concluding that the first jury's verdict was against the clear weight of the evidence, and thus, that a new trial should be ordered. Because the records in the first and second trials were so similar and because the grant of a new trial is reviewed for abuse of discretion — rather than de novo as is the grant of judgment as a matter of law — our holding that the defendant was entitled to judgment as a matter of law on the constructive discharge claim after the second trial means, *a fortiori,* that the district court did not abuse its discretion in granting a new trial after the first trial based on the same concerns about the sufficiency of the evidence. Of course, the district court granted a new trial on the retaliation claims after the first trial, but refused Titan's request for judgment as a matter of law on that claim after the second trial. We are satisfied, however, that while the evidence of retaliation is enough to sustain a jury verdict, it is weak enough that a judge could find that such a verdict was against the weight of the evidence and order a new trial.

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *GILL V. SYSTEM PLANNING CORPORATION*, 121 F.3D 698 (4TH CIR. 1997) DECIDED AUGUST 25, 1997

Ann L. GILL, Plaintiff-Appellee,

v.

SYSTEM PLANNING CORPORATION, Defendant-Appellant.

No. 96-2172.

United States Court of Appeals, Fourth Circuit.
Argued July 9, 1997.
Decided August 25, 1997.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge. (CA-95-1683-A)

* * *

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

OPINION

PER CURIAM

System Planning Corporation (SPC) appeals an order of the district court denying its motion for judgment as a matter of law after a jury awarded compensatory damages to Ann L. Gill

on her claims of retaliation in violation of Title VII, *see* 42 U.S.C.A. § 2000e-3 (a) (West 1994). Because we conclude that the jury verdict is not supported by substantial evidence, we reverse.

I.

SPC conducts research and development for the federal government, primarily as a defense contractor. During the spring and summer of 1994, when the events relevant to this litigation transpired, Gill was employed in SPC's Security and Information Systems Department (SISD), where her duties consisted of obtaining security clearances for SPC personnel and processing visitor requests. Additionally, Gill had been trained as a "LAN mentor," a person who could assist others with the operation of a computer network important to SPC's business. Although Gill regularly supervised other employees, her duties were primarily clerical.

Beginning in 1990, SPC found it necessary to reduce its work force significantly in response to decreases in federal defense spending. As part of this process, in early 1994 SPC employed a consultant, Dorsey Clement, to review the structure and operation of SISD. At that time, the department consisted of six people, including Gill; all were aware that the size of the department would be reduced in an effort to promote efficiency and cost-effectiveness. After conducting her review, Clement recommended that SISD be reorganized to consist of three new positions: A facilities security officer (FSO), an information systems security officer, and a document control specialist. All other positions in SISD would be eliminated.

Linda Easley, who was responsible for oversight of SISD, announced the availability of the FSO position in early May. Several individuals, including Gill and her immediate supervisor, Phyllis Moon, expressed an interest in the position. Easley interviewed Gill, Moon, and one other person before awarding the post to Moon in mid-June. Gill protested Moon's promotion, insisting that Moon was not qualified to be FSO and that she had been selected only because of her race. Gill expressed these concerns to personnel in SPC's human resources department, to Easley, to Easley's supervisor, and to Moon herself and informed them of her intent to file a charge of racial discrimination. Thereafter, Easley — who had previously been friendly to Gill — began to treat her in a "cold" and "businesslike" manner. J.A. 202.

After Easley transferred SISD employees to the remaining new positions recommended by Clement and two other SISD employees voluntarily resigned, Gill was left as the only member of the department without a position. When Easley met with Gill to inform her of this situation, she offered Gill a security-related position in another department. Gill declined the offer, stating that she did not wish to work there. Gill also refused a secretarial position before reluctantly agreeing to serve as a facilities assistant. Easley offered Gill that post because it entailed implementing plans to relocate a large number of SPC employees, a task with which Gill had previously demonstrated some skill. Her pay, benefits, and grade remained the same.

After the meeting, Gill went home and remained on sick leave for two weeks, so traumatized by the employment change that she became physically ill. Gill's condition worsened when she was informed that security files had been removed from her

office in her absence.[1] Gill's physician prescribed medication to alleviate her symptoms.

During the ensuing weeks, several incidents convinced Gill that she was no longer wanted at SPC. For example, upon reporting to her new position, Gill found herself in an office next to Easley and discovered that her duties consisted primarily of maintaining conference room supplies, packing boxes, and answering the telephone. And, although Gill had hoped to continue her activities as a LAN mentor, the computer in her new office was not powerful enough to support the LAN network. Shortly thereafter, Moon asked Gill to review some visitor requests while Gill was answering telephone calls at the front desk. Upon learning what Gill was doing, Easley instructed Moon to take the visitor requests away, stating that Gill no longer possessed the requisite security clearance. Moon did so, causing Gill to burst into tears. Gill also was not informed of a staff meeting that was announced while she was away on sick leave.

Almost immediately after her transfer, Gill began to seek employment elsewhere. Because SPC could not charge the expenses of her new position to any defense contract, Gill was concerned that SPC might lay her off in order to reduce its overhead expenses, a fear heightened by the fact that her responsibilities had been significantly reduced. Within a few days, Gill received an offer of employment from another company as an assistant FSO. Although she initially declined the offer because the salary was $4,000 less than her salary with SPC, Gill changed her mind after she observed a draft of a memorandum listing SPC employees that did not include her

1. Gill claims that her office was "cleaned out," but the record indicates that only the security files were removed.

name — an incident Gill describes in her brief as "a final cumulative blow." Brief for Appellee at 16.

After pursuing her administrative remedies, Gill filed this action in the district court alleging federal causes of action for discriminatory failure to promote and retaliation against SPC, — see 42 U.S.C.A. §§ 2000e-2 (a), 2000e-3 (a) (West 1994), and several state-law claims against SPC and Easley. The district court granted judgment to the defendants on Gill's state-law claims at various stages in the litigation, leaving only the federal issues for the consideration of the jury. The jury concluded that SPC had not discriminated against Gill, but returned a verdict in Gill's favor on her retaliation claims and awarded $80,000 in compensatory damages. After denying SPC's motion for judgment as a matter of law or for a new trial, the district court awarded attorneys' fees of $61,459.14. SPC now appeals.

II.

SPC primarily contends that the district court erred in denying its motion for judgment as a matter of law. We review de novo the denial of a motion for judgment as a matter of law to "determine whether substantial evidence exists upon which the jury could find for the appellee." *Benedi v. McNeil-P. P. C., Inc.*, 66 F.3d 1378, 1383 (4th Cir.1995). Thus, "[t]he question is whether a jury, viewing the evidence in the light most favorable to [Gill], could have properly reached the conclusion reached by this jury." *Benesh v. Amphenol Corp. (In re Wildewood Litigation)*, 52 F.3d 499, 502 (4th Cir.1995).

Gill's claims that SPC retaliated against her in violation of Title VII for pursuing a charge of racial discrimination rest on two distinct but factually related theories. First, Gill maintains

that SPC retaliated against her by eliminating her position in SISD and transferring her to another position. Second, she argues that SPC constructively discharged her in retaliation for her threats to pursue charges of racial discrimination; the constructive discharge allegedly was accomplished through the elimination of her original position, the transfer, and the poor treatment she received after the transfer. We conclude, however, that the evidence in the record is insufficient to allow a rational jury to find in favor of Gill on either of her retaliation claims.

In order to establish a prima facie case of retaliation, a plaintiff "must show that (1) he engaged in protected activity; (2) his employer took adverse employment action against him; and (3) a sufficient causal connection existed between his protected activity and his employer's adverse employment action." *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir.), *cert. denied*, 117 S.Ct. 70 (1996). The burden of production then shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. *See Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 479 (7th Cir.1995). Finally, the plaintiff must persuade the factfinder that the asserted reason for the adverse employment action is a mere pretext and that the true reason for the action was retaliation. *See id.*

Gill's first claim of retaliation — based on the elimination of her position in SISD and her subsequent transfer — must fail because, even assuming that she can establish a prima facie case of retaliation,[2] SPC articulated a legitimate, nonretaliatory reason

2. The validity of this assumption is by no means clear. For example, it is questionable whether Gill — who was transferred to a different position carrying the same grade, pay, and benefits — suffered an "adverse (Cont'd)

for its actions which Gill has failed to rebut. As Easley explained during her testimony, Gill's services were no longer necessary in SISD because her responsibilities, which had been primarily clerical and administrative, could be performed by computer. Our review of the record reveals no evidence to refute this explanation for the decision to transfer Gill to another department. Accordingly, substantial evidence does not exist to support a determination that SPC's asserted reason for Gill's transfer was mere pretext for retaliation, and the district court erred in refusing to grant SPC's motion for judgment as a matter of law on this claim.

Gill's constructive discharge claim is similarly unsupported by the evidence in the record. In order to prove that she was constructively discharged, Gill must show that SPC made her working conditions objectively intolerable in a deliberate attempt to force her to resign:

> The doctrine of constructive discharge protects an employee from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his coworkers. The employee is not, however, guaranteed a working environment free of stress. Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.

(Cont'd)
employment action." *See Hopkins*, 77 F.3d at 755 (suggesting that an employee whose position was eliminated during a reduction in force but who could have continued his employment in a different position did not suffer an adverse employment action).

Carter v. Ball, 33 F.3d 450, 459 (4th Cir.1994) (citations & internal quotation marks omitted).

The record clearly establishes that Gill was unhappy with her working conditions to the point that she suffered physical symptoms requiring medical treatment. However, Gill's reaction to her working conditions is immaterial. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir.1985) (explaining that an employee's "unreasonably sensitive" reaction to the work environment does not provide proof of constructive discharge (internal quotation marks omitted)). Rather, the pertinent question is whether there is substantial evidence to support a finding that Gill's working conditions were objectively unreasonable. Gill has not satisfied this standard. First, as discussed above, Gill's transfer — which she characterizes as a demotion — does not alone prove that her working conditions were unreasonable. Gill experienced no loss of pay, grade, or benefits. And, the other incidents of which she complains, while perhaps annoying or unpleasant, are not so intolerable that a reasonable person would feel compelled to quit. Moreover, Easley's efforts to find another position for Gill after her security position was eliminated belie the notion that SPC intended to force Gill to resign. We therefore conclude that substantial evidence does not support the jury verdict for Gill on her claim that SPC retaliated against her by means of a constructive discharge. Thus, the district court erred in refusing to grant SPC's motion for judgment as a matter of law on this count.

III.

Because the evidence produced in support of Gill's claims of retaliation is not sufficient to support the verdict, we determine that the district court erred in denying SPC's motion for judgment

as a matter of law. Accordingly, we reverse. Our conclusion on this point renders consideration of SPC's other arguments on appeal unnecessary, but the award of attorneys' fees must also be vacated in light of our holding.

REVERSED

SUPREME COURT OF THE UNITED STATES

JANICE E. HETZEL *v.* PRINCE WILLIAM COUNTY, VIRGINIA, AND CHARLIE T. DEANE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97–954. Decided March 23, 1998

PER CURIAM.

A jury in the Eastern District of Virginia found for petitioner Hetzel on her claims against respondent County of Prince William under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e, *et seq.*, and 42 U.S.C. §1983. The District Court reduced the damages from $750,000 to $500,000, on the grounds that one of the claims supporting the award was legally insufficient. On respondents' appeal to the Court of Appeals for the Fourth Circuit, that court affirmed the finding of liability, but held that the damage award was grossly excessive because it was unsupported by the limited evidence of harm presented at trial. *Hetzel* v. *County of Prince William*, 89 F. 3d 169 (1996), cert. denied, 519 U. S. ___ (1996). The court "set aside the damage award and remand[ed] the case to the district court for the recalculation of the award of damages for emotional distress." 89 F.3d., at 173.

On remand, the District Court recalculated the damages and awarded petitioner $50,000. Petitioner filed a motion for a new trial in which she declined the award. She argued that in reducing her damages, the Court of Appeals in effect had offered her a remittitur, and that she was therefore entitled to a new trial under the Seventh Amendment's guaranty of a right to trial by jury. Respondents agreed that the Court of Appeals' decision functioned as a remittitur, but contended that the decision did

not allow petitioner the option of a new trial. In a memorandum opinion, the District Court determined that although the Court of Appeals' mandate clearly reversed the judgment and remanded for recalculation of damages, it did not address the Seventh Amendment issue, which had not arisen until petitioner rejected the recalculated damage award and sought a new trial. Concluding that circuit precedent was clear that when a court finds a jury's verdict excessive and reduces it, the plaintiff has a right either to accept the reduced award or to have a new trial, the court granted petitioner's motion for a new trial on the issue of damages.

Respondents petitioned the Court of Appeals for a writ of mandamus, contending that the District Court did not have authority under its prior decision to order a new trial. In an unpublished order, the Court of Appeals granted the petition and stayed the scheduled retrial. It stated that its prior decision had ordered the District Court to recalculate the damages "and to enter final judgment thereon." It also reiterated that pursuant to its earlier mandate, the District Court should closely examine two cases it had previously noted as comparable to what would be an appropriate award in petitioner's case.[1]

Petitioner contends that this action of the Court of Appeals violated her Seventh Amendment right to a jury trial.[2] We agree. The Seventh Amendment provides that

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[1]After the Court of Appeals issued its mandamus order, the District Court again recalculated the damages and entered judgment for petitioner in the amount of $15,000, which was the greater of the amounts awarded in the two cases noted by the Court of Appeals. Petitioner's appeal from that judgment is pending in the Court of Appeals. We do not think it appropriate to stay our decision, however, since the Court of Appeals, at the time it issued its writ of mandamus, was presented with petitioner's Seventh Amendment claim in the District Court's memorandum opinion granting a new trial.

[2]Respondents argue that we should not consider petitioner's Seventh Amendment claim because she failed to raise it in her prior petition for certiorari. *Hetzel* v. *County of Prince William*, 89 F. 3d 169 (CA4 1996), *cert. denied*, 518 U. S. __ (1996). We think it apparent, however, that petitioner did not raise this claim at that time because she reasonably construed the Court of Appeals' decision as not depriving her of the option of a new trial if she were to reject the remitted damage award. The Court of Appeals' decision ordered only that the judgment be reversed and the case remanded to the District Court for recalculation of damages. *Id.*, at 173. To interpret that decision as precluding the option of a new trial would require petitioner to assume a deviation from normal practice and an action by the Court of Appeals that at minimum implicated constitutional concerns. We agree with the District Court that the original mandate was not so explicit as to compel that interpretation.

"the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amdt. 7.

In *Kennon* v. *Gilmer*, 131 U. S. 22, 27–28 (1889), the plaintiff won a general damages verdict for $20,000, and the trial court denied a motion for a new trial. On appeal, the Supreme Court of the Territory of Montana reduced the verdict to $10,000 on the grounds that the evidence was insufficient to sustain such a high damages award, and affirmed the judgment for that amount. *Id.*, at 27–28. This Court concluded that the judgment reducing the amount of the verdict "without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented." *Id.*, at 27–28. It noted that in accord with the Seventh Amendment's prohibition on the reexamination of facts determined by a jury, a court has no authority, upon a motion for a new trial, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury." *Id.*, at 29.

In determining that the evidence did not support the

jury's general damages award and in ordering the District Court to recalculate the damages, the Court of Appeals in this case imposed a remittitur. The District Court correctly afforded petitioner the option of a new trial when it entered judgment for the reduced damages. The Court of Appeals' writ of mandamus, requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment. See *id.*, at 29–30; see also *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1935) (reaffirming the practice of conditionally remitting damages, but noting that where a verdict is set aside as grossly inadequate or excessive, both parties remain entitled to have a jury determine the issues of liability and the extent of injury); *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 433 (1996) (the trial judge's discretion includes "overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)"); *id.*, at 462–463 (SCALIA, J., dissenting).

Respondents contend that the action of the Court of Appeals here is supported by *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 329–330 (1967). But that case dealt with the application Fed. Rule Civ. Proc. 50(d) in a situation where the Court of Appeals had held that the evidence was insufficient to support a finding of liability. It did not involve overturning an award of damages where the evidence was found sufficient to support a finding of liability.

We therefore grant the petition for certiorari and reverse the judgment of the Court of Appeals issuing a writ of mandamus to the District Court.

Reversed.